Supreme Court, U. S.
FILED
MAY 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1384

CLAY COMMUNICATIONS, INC., *Petitioner*

v.

JAMES M. SPROUSE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

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PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

Petitioner, Clay Communications, Inc., publisher of The Charleston Daily Mail, a daily newspaper published in Charleston, West Virginia, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the West Virginia Supreme Court of Appeals entered on February 4, 1975, affirming a jury verdict for $250,000 actual damages, reversing a jury verdict for $500,000 punitive damages and remanding the cause with directions to strike the punitive award from the judgment below in favor of respondent (hereafter "plaintiff") in this libel action.

OPINIONS BELOW

The complete opinion of the West Virginia Supreme Court of Appeals, printed in Appendix A hereto, is reported in 211 S.E. 2d 674 (1975). The final order of the West Virginia Supreme Court is attached hereto as Appendix B. The order of the Circuit Court of Fayette County, West Virginia, filed December 21, 1973, together with a Memorandum Opinion of said Circuit Court dated December 7, 1973, is attached hereto as Appendix C. The order of said Circuit Court dated December 9, 1970, together with a letter opinion of said Circuit Court dated November 10, 1970 is attached hereto as Appendix D. The order of said Circuit Court dated May 26, 1970, together with a letter opinion of said Circuit Court dated March 24, 1970, is attached hereto as Appendix E. The instructions given and refused by the trial court are contained in the Record of Proceedings in the trial court at pages 857-894.[1] The instructions here complained of are attached hereto as Appendix F.

JURISDICTION

The judgment of the Supreme Court of Appeals was entered on February 4, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

QUESTIONS PRESENTED

1. Whether in a libel action by an unsuccessful gubernatorial candidate against a newspaper that supported his successful opponent, publications may

[1] Appendix references herein are by page numbe. as "App. A, p. 1a". References to the Record of Proceedings in the trial court are by page number as "R. 1". References to errors assigned by petitioner in the W. Va. Supreme Court of Appeals, although designated R. , are to numbered pages of the Petition which is the first document in the Record.

be held actionable without abridging First Amendment freedoms on the ground that their headlines, through use of such words as "bonanza," "disclosed," "clean-up," "dummy corporation," and "land grab" intentionally conveyed a "misleading" impression that the plaintiff had been guilty of improper conduct, although the body of the stories concededly contained no such assertion beyond quoting correctly plaintiff's opponent in the election, who used the words "land grab" and "dummy corporation."

2. Whether a publication, reporting accurately statements made by the plaintiff's opponent in the election, may constitutionally be held actionable on the ground the newspaper knew or was reckless with respect to the falsity of the statements by the oponent.

3. Whether in the same action it was constitutionally permissible for the jury in determining malice, and the Court in sustaining its determination, to accord weight to the inference that a motive of the publication was to injure the plaintiff in his candidacy for election or to assist his opponent.

4. Whether the record as a whole, including any deviation between the headlines and the body of the stories and the instructions to the jury, is constitutionally sufficient to sustain a finding that the publications contained false and defamatory statements of fact published with knowledge that they were false or with a reckless disregard of whether they were true or false.

5. Whether the plaintiff's uncorroborated testimony, over objection, that he believed his campaign for

Governor was seriously damaged by the publications and that his reputation was damaged and that he and his family suffered mental anguish as a result thereof, (although subsequently, and before trial, he had been elected to the state's highest court) was constitutionally sufficient to sustain a jury award of $250,000 as actual damages.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment I: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Amendment XIV: ". . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Plaintiff, James M. Sprouse, since January 1973, a Justice of the Supreme Court of Appeals of West Virginia, but in 1968 the nominee of the Democratic Party for Governor of that State, brought an action for libel against petitioner based on publications contained in petitioner's Republican newspaper, The Charleston Daily Mail, (hereafter the "Daily Mail") on October 24 and 25, 1968. In the November, 1968 general election, plaintiff lost the election to his Republican opponent, Arch A. Moore, Jr. The action for libel was instituted in Fayette County, West Virginia, on October 29, 1969, after an earlier action, based on the same publications, instituted on October 29, 1968, in Kanawha County, West Virginia, where plaintiff then resided and where the Daily Mail is published, had been dismissed on motion for failure to state a claim on which relief could be granted.[2]

A trial which began in Fayette County, West Virginia, on July 25, 1973, culminated in a jury verdict for $250,000 compensatory and $500,000 punitive damages. In the trial court, petitioner objected on First Amendment grounds to (a) the sufficiency of the evidence by motions for a directed verdict (R. 576, 648-652) and for judgment N.O.V. (R. 117-125), (b) admission of plaintiff's testimony that the publications damaged his political campaign and, inferentially, lost him the election (R. 445-453), (c) the giving and reading to the jury of plaintiff's instructions number 2a (R. 681-683), 5 (R. 663-665), 7 (R. 666-669) and 10 (R. 673-675) and (d) the refusal to give and read to the jury a portion of petitioner's instruction number 3 (R. 685), and peti-

[2] In the Circuit Court of Fayette County petitioner moved to dismiss this action for lack of venue and moved for Summary Judgment on the grounds of *res judicata*. The denial of these motions was unsuccessfully urged as error in the court below (R. 21, App. A, pp. 29a-36a). The opinion of the court below ignored petitioner's argument that the court's reading of the West Virginia venue statutes (W.Va. *Code*, § 56-1-1 and 2) in *Hanks* v. *Beckley Newspapers*, 149 W.Va. 522, 142 S.E. 2d 747 (1965), to the effect that any incorporated publisher could be sued for libel in any county in which the newspaper is circulated, violates the First and Fourteenth Amendments. It is clear that under the West Virginia venue statutes, an unincorporated publisher can only be sued for libel in the county where he resides, absent a venue giving corporate defendant. The court below also held that in future cases, but not in this case, dismissal of a prior action in the manner done in this case by the Circuit Court of Kanawha County would constitute a final adjudication on the merits. Since the same legal principle had been previously established by the court below in *Barker* v. *The Traders Bank*, 152 W.Va. 774, 166 S.E.2d 331 (1969), petitioner may have been denied the "fundamental fairness" required by the Fourteenth Amendment. These issues are not included in the Questions Presented or as Reasons for Granting the Writ in this Petition.

tioner's instructions number 6 (R. 687), 7 (R. 687-689), 14 (R. 693), 16 (R. 694-695) and 18 (R. 698-699). These objections were renewed as points of error in the Supreme Court of Appeals (R. 22-25), but are either ignored in the Court's opinion, summarily rejected in the opinion in n. 1 at App. A, pp. 5a-6a, or rejected in the opinion at App. A, pp. 37a-40a.

I. THE EVIDENCE ADDUCED AT TRIAL

A. Background of the Publications and Participation of the Moore Aides.

Early in his 1968 campaign for Governor of West Virginia plaintiff made a public disclosure through the media of what he said was his income and assets. A front page story in the Democratic "Charlston Gazette" on March 28, 1968, quoted plaintiff as describing his assets as follows: "A house in Charleston, value about $49,000, mortgage of $23,600 outstanding; farm, equipment and animals in Randolph County, value about $15,000; lots in Nicholas County, Dunbar and Florida, total value about $6,700; *interest in forest acreage, Pendleton County, $10,000;* 60 shares Life Insurance of Kentucky, $1,800; 250 shares Riverside Nursing Home, $12,000; varying number of shares in the name of each of his five (5) children, Massachusetts Mutual Growth Fund for Education, $10,000 . . ." (R. 461). (Emphasis supplied). Plaintiff testified the story was correct as far as he knew (R. 463).

On or about October 14, 1968, two campaign aides of Republican Candidate Arch A. Moore, Jr., met with the Daily Mail's Editor, Managing Editor and Political Editor. (R. 555, 556). The Moore aides had documentary evidence concerning plaintiff's connection with Selmet Properties, Inc., a New York corporation,

(hereinafter "Selmet") which indicated that plaintiff's statement in March of 1968 that he "owned an interest in forest acreage, Pendleton County, $10,000" was misleading in that the value of the acreage was substantially understated, and that he did not own it directly, but through Selmet.

The two Moore aides were Norman Yost, a professional newspaperman, and William Loy, a West Virginia attorney who, before joining Moore's staff, had practiced law in the West Virginia judicial circuit which included Pendleton County and who had lived in the area since childhood. (R. 629, 630).

The Daily Mail employees with whom the Moore aides met were Editor, Jack Maurice, Managing Editor, Vint Jennings (now deceased) and Robert Mellace, Political Editor. Maurice had been a working newspaperman continuously since his college matriculation in 1935 (R. 554). Mellace, except for three years in the Army after his university matriculation in 1941, had also continuously been a working newspaperman, first serving as a reporter, columnist and Managing Editor of the Morgantown, (W. Va.) Post, and since 1953, as State Capitol Reporter and Political Reporter of the Daily Mail (R. 373).

The documents and other information supplied the Daily Mail by Loy related to plaintiff's connection with Selmet, which had been incorporated as a New York corporation in 1965, and which, in 1966, had acquired for $134,620 cash, 2,900 acres of land in Pendleton County, West Virginia, adjacent to the Monongahela National Forest and close to a large recreational complex, the development of which had been authorized by the U.S. Congress in September 1965. From out-conveyances, Selmet had already received $182,796.75

at the time of publication. The most recent outconveyance by Selmet had been made only a short time before publication, on October 2, 1968. This was a deed to Nature Conservancy, Inc., for a recited sales price of $81,364, which conveyance Loy said was for the ultimate transfer to the U.S. Forest Service, a transfer that was later made on June 9, 1969 (R. 843). Except for his execution of some deeds as President of Selmet, and his execution of an application to qualify this foreign corporation to do business in West Virginia, plaintiff made no other public disclosure of his interest in Selmet before his press conference on October 25, 1968, the day after the Daily Mail publication of October 24, 1968 (R. 465).

The Daily Mail Editors were fully aware of the self interest of the Moore aides, but as Mellace testified, ". . . 99% of stories like this are originated by somebody in a political campaign" (R. 283).

The Daily Mail Editors decided that Mellace should go to Elkins, West Virginia, the site of the West Virginia office of the U.S. Forest Service and to Pendleton County, where the Selmet land was situated to investigate the matter.

Mellace flew to Elkins on October 22, 1968, in a plane owned and piloted by Daily Mail photographer, Chester Hawes (R. 597). They were accompanied by William Loy, who knew where the Selmet property was located (R. 640). Another Moore aide, Sandy Latimer, met Mellace, Hawes and Loy at the Elkins Airport and drove Mellace to the places he wanted to go (R. 291-292).

Mellace first visited the office of the U.S. Forest Service, where he went in alone (R. 292) and talked for

about an hour and one-half (R. 301) with E. M. Olliver, the senior officer in charge.

The Moore aides then drove Mellace and the Daily Mail photographer to the location of Selmet's remaining acreage which was level and adjoined a highway. Using the acreage recited in Selmet's out conveyances, Mellace calculated Selmet had valuable property remaining of more than 400 acres. Based on the sales prices of similar property sold by Selmet and information Mellace obtained from local residents, Mellace believed that Selmet's remaining acreage might be worth as much as $400,000.

Abstracts of public records made by attorney Loy and provided to Mellace demonstrated that Selmet had violated West Virginia law by acquiring the 2,900 acres and making several sales of real estate without qualifying to hold property and to do business in West Virginia (W. Va. *Code*, § 31-1-79).

On October 24, 1968, about an hour and a half before the Daily Mail was on the streets, Mellace gave Moore aide, Yost, a carbon copy of his story for distribution to other newspapers (R. 363-365). A carbon copy was also routinely made available to the Associated Press (R. 561).

There is no evidence that the Moore aides did anything more than supply Mellace with information, the accuracy of none of which is disputed. There is no evidence of a "plan or scheme" to discredit plaintiff unless the evidence summarized under this subheading, plus the fact that the Daily Mail is a Republican newspaper, can be so characterized.

B. The Publications.

The three Daily Mail publications at issue in this case were published in the Daily Mail of October 24, 1968 and October 25, 1968 and are reproduced in the Appendix to the Opinion of the Supreme Court of Appeals of West Virginia (Appendix A to this Petition).

Except for the headlines, all of which were written at the "copy" or "news desk" by one or more of several "copy writers" under direction of a copy or news editor (R. 560, 561), the three stories were written by Robert Mellace.

The Daily Mail story of October 24, 1968 reported that a New York corporation (Selmet) headed by plaintiff stood to make a handsome profit dealing in property located in Pendleton County, West Virginia, close to a federally funded recreation complex. The story told where the property was located, when and from whom it was acquired, how much of the acreage had been sold, how much of the acreage appeared to be still owned by Selmet and other details concerning the land dealings of Selmet and plaintiff's involvement with Selmet, all of which was learned by Mellace in his investigation or furnished to Mellace by Loy. The West Virginia Supreme Court concedes that this story was factually accurate (App. A. p. 8a).

One of the stories in the Daily Mail of October 25, 1968 was about D. C. Harper and the "Seneca Rocks". While he was in the Pendleton County area, Mellace and his party made a chance stop at the general store operated by D. C. Harper. Mellace knew Harper. In

talking to him, Mellace learned that the U.S. Forest Service had offered the Harper family $7,900 for the "Seneca Rocks" which Harper said his faimly had owned for approximately 200 years and which are a great natural scenic attraction. Congress, in establishing the "Recreation Area" by Public Law 89-207, named it the "Spruce-Knob-Seneca Rocks National Recreational Area." Mellace though it newsworthy that the U.S. Forest Service would voluntarily pay Selmet $81,364 for recently cut over hillside for a road location, but would only offer the Harper's $7,900 for their famous Seneca Rocks. Mellace's opinion was vindicated later. In a condemnation proceeding the Harpers were awarded $175,000 for the Seneca Rocks (R. 270). The factual accuracy of the Mellace story is conceded by the court below.

The other story in the Daily Mail of October 25, 1968 admittedly quotes, and quotes correctly, statements of Arch A. Moore, Jr., plaintiff's opponent in the West Virginia gubernatorial election campaign.

The headlines of the stories were not written by either Mellace or Maurice (R. 304, 307, 336-337, 340-341, 560-561) and there is no evidence that the writer of any of the headlines entertained any doubts about the truth of the headlines. Mellace testified: "No, I didn't see the headline before it went in the paper." (R. 304). The only evidence at the trial about the proper purpose of headlines was the testimony of Daily Mail Editor, J. D. Maurice (R. 561) that: "The primary function of the headline in the Daily Mail, and I guess in most newspapers, is to call the reader's attention to, and give

some indication of, the content of the story which follows."

C. Damages.

Plaintiff alleged no pecuniary loss in his complaint, but in his prayer for general damages, alleged that his political career as a candidate for Governor was "damaged beyond repair." (R. 10). At the trial plaintiff's only evidence of damages was his own uncorroborated testimony that his political campaign was damaged, that his reputation had been damaged, and that he and his family had suffered mental anguish. Petitioner objected to plaintiff being permitted to testify about damage to his political campaign. The trial court ruled that this evidence was admissible on the question of general damages (R. 445-453).

In 1972 plaintiff was nominated as a Democratic candidate for and subsequently was elected to the Supreme Court of Appeals, receiving in the primary and general election the highest vote of any candidate (R. 840 E, 840 F).

The jury returned a verdict of $250,000 compensatory and $500,000 punitive damages.

D. The Instructions.

While generally speaking the instructions given the jury by the trial court paid lip service to *New York Times*, this petitioner objected to some of them at the trial and on appeal contended that the giving of these instructions was error. (See n. 1, App. A, pp. 5a-6a). Plaintiff's instruction No. 2a (R. 859) instructed the jury that "libel" in the case of a nominee for public office was a "false writing" published with a reckless disregard of its falstiy "and which tends to injure the

reputation of the nominee . . ." Plaintiff's instruction No. 5 said in effect that petitioner had no greater right to speak critically of the plaintiff during a political campaign than on any other occasion. Nowhere in any of plaintiff's instructions or in any of those of petitioner which were given by the trial court was the jury told that there had to be a "false statement of fact" rather than just a false statement. Petitioner's instruction No. 6, which the trial court refused to give and which action the court below sustained, would have told the jury that there had to be a false statement of fact and that illwill or other bad motives were not evidence of actual malice. While refusing the petitioner's instruction No. 6, the court gave plaintiff's instruction No. 7 which instructed the jury that illwill could be considered as evidence of actual malice. These and other instructions complained of are set forth in full in App. F, pp. 75a-79a.

II. THE OPINION OF THE WEST VIRGINIA SUPREME COURT OF APPEALS

On appeal, the Supreme Court of Appeals of West Virginia, with Justice Sprouse and another of the five members of the court disqualifying themselves, affirmed the judgment insofar as it awarded $250,000 as "actual damages". In the view that "an award of $250,000 actual damages is adequate for the purpose of dissuading publishers from similar willful reckless conduct in the future" and that "an award of $750,000 would have a chilling effect upon the legitimate exercise of First Amendment rights", the verdict and judgment of $500,000 as punitive damages were set aside.

In sustaining the judgment awarding $250,000 as "actual damages", the court below purported to recog-

nize that the plaintiff, as a candidate for governor complaining of a publication as a libelous aspersion of his integrity, was required by *New York Times*, and later decisions of this Court [3] interpreting the First Amendment, to prove a false and defamatory statement published maliciously, *i.e.* with knowledge that it was false or with a reckless disregard of whether it was false or not. The court below considered that the publications "implied that enormous profits would inure to Sprouse's benefit as a result of 'inside' information which Sprouse acquired through his Democratic Party affiliation concerning plans of the United States Government to establish a national park at Seneca Rocks." (App. A, p. 4a). Though none of the three stories

[3] For brevity and ease of reading, we shall in this Petition refer to past First Amendment decisions of this Court by their shorthand names, i.e. *New York Times*, *Garrison*, *Butts*, *Gertz*, etc. Decisions so referred to may include *New York Times* v. *Sullivan*, 376 U.S. 254, 11 L.Ed. 2d 686, 84 S.Ct. 710 (1964); *Garrison* v. *Louisiana*, 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964); *Henry* v. *Collins*, 380 U.S. 356, 13 L.Ed.2d 892, 85 S.Ct. 992 (1965); *Rosenblatt* v. *Baer*, 383 U.S. 75, 15 L.Ed.2d 597, 86 S.Ct. 669 (1966); *Time, Inc.* v. *Hill*, 385 U.S. 374, 17 L.Ed.2d 456, 87 S.Ct. 534 (1967) *Curtis Publishing Co.* v. *Butts*, and *Associated Press* v. *Walker*, 388 U.S. 130, 18 L.Ed.2d 1094 87 S.Ct. 1975 (1967); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 19 L.Ed.2d 248, 88 S.Ct. 197 (1967); *St. Amant* v. *Thompson*, 390 U.S. 727, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968); *Greenbelt Cooperative Publishing Assn.* v. *Bresler*, 398 U.S. 6, 26 L.Ed.2d 6, 90 S.Ct. 1537 (1970); *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 28 L.Ed.2d 35, 91 S.Ct. 621 (1971); *Time* v. *Pape*, 401 U.S. 279, 28 L.Ed.2d 45, 91 S.Ct. 633 (1971); *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 28 L.Ed.2d 57, 91 S.Ct. 628 (1971); *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 29 L.Ed.2d 296, 91 S.Ct. 1811 (1971); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed.2d 789, (1974); *Old Dominion Branch No. 496, Nat'l Assn. Ltr. Carriers* v. *Austin*, 418 U.S. 264, 41 L.Ed.2d 745 (1974); *Cantrell* v. *Forest City Publishing Co.*, 418 U.S. 909, 42 L.Ed.2d 419 (1975); *Cox Broadcasting Corp.* v. *Cohn*, — U.S. —, 43 L.Ed.2d 328 (1975).

published by petitioner stated that plaintiff had acquired such "inside information", the court below held the evidence sufficient to sustain a jury verdict of malicious falsehood on essentially the following asserted grounds:

(1) The stories were published pursuant to a plan and purpose to injure the plaintiff's gubernatorial candidacy and to aid his Republican opponent (App. A, pp. 25a, 26a, 40a);

(2) Given that plan and purpose, the use of "misleading words in over-sized headlines", such as "land grab", "dummy firm", "bonanza", "disclose" and "clean up", conveyed an intentionally false implication unsupported by the body of the publications (App. A, pp. 7a, 8a);

(3) Given that plan and purpose, "the difference between the fair implication of the headlines as opposed to the supporting factual recitation of the stories is evidence alone of malice, which absent evidence to the contrary, supports the jury verdict" (App. A, pp. 25a-27a); and

(4) Given that plan and purpose, the petitioner "did not publish the stories in question exclusively as a news gathering agency" and was not, therefore entitled, as petitioner contends, to publish the statement of plaintiff's opponent in the election without subjecting it to "any test of truth". (App. pp. 18a, 19a, 25a-27a, 40a).

Even the wholly accurate story published on October 25, 1968, under the headline "Fortune to Jim Sprouse Pittance for Seneca" and the subheadline 'Landmark's Owners Plan Court Fight Against Deal" was held to

support "a jury conclusion that there was a deliberate effort to imply that profit to Sprouse was acquired at the expense of an honest farmer", and to have been "published with knowledge that it was false or misleading"—though the contrast between payment to the plaintiff's company and the offer to the owner of the Seneca Rocks was plainly a fact that the petitioner was constitutionally privileged to publish.

Finally, in sustaining the award of $250,000 in "actual damages" the court below said:

> "The job of determing such intangible and subjective damages as personal humiliation, mental anguish, and indignity has always been the exclusive province of the jury subject to the gentle rule that awards in these areas not be excessive. In light of the amount of jury awards for pain and suffering which are routinely sustained by appellate courts in tort actions involving physical injury, and considering the rank and station in life of the plaintiff at the time of publication, this Court finds that the award of $250,000 actual damages were not excessive." (App. A, p. 29a).

REASONS FOR GRANTING THE WRIT

The judgment of the Supreme Court of Appeals of West Virginia sustaining the verdict and judgment of $250,000 "actual damages" for libel abridges First Amendment freedom in the area in which this Court has said "the constitutional guarantee has its fullest and most urgent application—the conduct of campaigns for public office". *Monitor Patriot Co.* at p. 272. Conceiving the question presented to be one of "first impression in the United States in light of *New York Times* v. *Sullivan*" (App. A, pp. 4a, 5a) and the case "unique in the annals of reported libel cases" (App.

A, p. 7a), the judgment fashions a novel test of liability in libel actions by an unsuccessful candidate against a newspaper supporting his opponent. If the judgment stands, its inevitable consequence will be a litigious sequel to hotly contested elections that clearly is repugnant to the Constitution. Both the principles put forward by the court below and their application to this record call for review and reversal by this Court.

1. In holding that there was sufficient evidence of "actual malice" to sustain liability for "misleading" headlines appearing above each of the three articles, the court below accorded decisive import to what it conceived to be a plan and purpose on the part of the petitioner and the opposing candidate for Governor to injure the plaintiff's reputation and his chances of election. This plan and purpose were accorded weight in holding that the headlines were defamatory, in holding that the discrepancy between the headlines, [which the court below characterizes as "misleading words . . . rather than outright false statements" (App. A. p. 7a)], and the "facts" in the body of the stories was sufficient evidence of actual malice, and in denying any privilege to print the statements of plaintiff's opponent without subjecting them to a test of truth. This was a repudiation of the doctrine of this Court that an intent to injure, as distinguished from intent to injure by publishing knowingly or recklessly false and defamatory statement of fact, is insufficient to permit recovery in libel. *Garrison* at p. 73, 74, *Beckley Newspapers, Greenbelt, Old Dominion, Gertz.* The judgment totally ignored the teaching of this Court that "rhetorical hyperbole" is not constitutionally actionable (*Greenbelt* at p. 14) and that "Under the First Amendment there is no such thing as a false idea. However pernici-

ous an opinion", we do not depend on courts for its correction, "but on the competition of other ideas." *Gertz* at p. 339.

No less significantly, the court below misread the judgments of this Court in *Butts* and *Walker*, to "stand for the proposition that when a newspaper departs from an attempt to report the news objectively, the fact of such departure can be considered by the jury and an appellate court in determining whether there was willful disregard of truth" (App. A, pp. 18a-20a). These decisions, the court below thought, "stand for the proposition that personal motives on the part of a newspaper, or participation by a newspaper in a plan or scheme to injure, is evidence of recklessness and willful disregard for truth which may be considered with other evidence on the question of actual malice". Since there was no other evidence, motive and plan were the determinative factors in themselves, in clear defiance of this Court's decision in *Garrison* at p. 73, and later decisions, most recently *Gertz* and *Old Dominion*. Indeed, the notion that it is appropriate for a court in appraising liability for libel to differentiate between a newspaper that publishes "exclusively as a news gathering agency" and one that "departs from an attempt to report the news objectively" (App. A, p. 18a, 19a) reflects a misconception of the freedom of the press that should not escape correction by this Court.

2. The court below sustained the jury verdict for plaintiff in part on the headline terms "dummy firm," "land grab," and the accompanying story accurately reporting statements made by and attributed to Arch A. Moore, Jr., plaintiff's opponent in the 1968 gubernatorial campaign (who was also at the time a member of the U. S. House of Representatives). The opponent

used the terms which were in the Daily Mail headline. The court below also sustained the refusal of the trial court to give petitioner's proposed Instruction No. 7 (App. F, p. 78a) which would have instructed the jury that the Daily Mail had no duty to subject Moore's statement to any test of truth.

Aside from the lack of evidence in this record to show that the Daily Mail published Moore's statements on October 25, 1968, with the high degree of awareness of probable falsity required for a finding of actual malice or even subjected the Moore statements to any test of truth, is it consistent with the First Amendment to impose on the press a duty to censor a statement of public officials and candidates for public office when a newspaper reporter may not believe it to be true? Is a newspaper to sit in judgment as to whether a public official is expressing a falsehood or speaks with a reckless disregard of truth? *New York Times* and subsequent cases have not faced this specific issue, the closest analogy being *Greenbelt*. Because of the decision below it is timely and important that this question be considered by this Court. Such a duty to censor is clearly contrary to the spirit of *New York Times* and its progeny and to the First Amendment distinction between freedom of speech and a free press. To require, at the risk of libel awards, that the press exercise such a censorship role is incompatible with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open." *New York Times* at p. 270. Such a requirement would, as a practical matter, make it impossible for the press even to "serve as a neutral forum for debate, a 'market place for ideas,' a kind of Hyde Park corner for the community," itself a limited con-

cept of press freedom which at least some members of this Court reject.[4]

3. In holding that the award of $250,000 actual damages is supported by the evidence, consisting as it did of plaintiff's uncorroborated testimony that his political campaign was seriously damaged, that he and his family had suffered mental anguish and that his reputation had been injured, the court below decided an important question of First Amendment law that warrants the consideration of this Court. The full implications of this Court's opinion in *Gertz* on the measure of "actual damages" in libel are significantly tested by a case in which the gravamen of the plaintiff's grievance, emotionally repeated by his counsel at the trial (R. 747, 805, 806), is that he lost a gubernatorial election, though he was subsequently elected to the State's highest court. Whether loss of the election is an admissible item of "actual damage" given the inevitably speculative question of cause and effect in such an area [see *Southwestern Publishing Co.* v. *Horsey*, 230 F.2d 319 (9th Cir. 1956)] is in itself an important question warranting this Court's review. The analogy drawn by the court below (App. A, p. 29a) to "the amount of jury awards for pain and suffering which are routinely sustained by appellate courts in tort actions involving physical injury" hardly reflects the sensitivity to First Amendment values that this Court reflected in discussing "actual damages" in *Gertz*.

The court below saw no question of constitutional magnitude in the size of the Fayette County jury ver-

[4] Address of Justice Potter Stewart, "Or Of the Press", Yale Law School, November 2, 1974.

dict, in admitting plaintiff's testimony regarding damage to his political campaign, or in giving plaintiff's Instruction 10,[5] even though plaintiff is a very popular political figure in Fayette County, having carried it over Moore in 1968 by a vote of 14,671 to 6,602 (R. 840-B).

4. The court below admits to a concern that its decision "may ultimately result in self censorship by newspapers." (App. A, p. 24a).

This Court "has often recognized that in cases involving free expression we have the obligation, not only to formulate principles capable of general application, but also to review the facts to insure that the speech involved is not protected under federal law." *Old Dominion Branch* at p. 282; *New York Times* at pp. 284-285; *Greenbelt* at p. 11. "We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U.S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times* at p. 285.

A review of the record discloses that here, as in *Beckley Newspapers* v. *Hanks*, the West Virginia Supreme Court has failed to abide by the First Amendment.

[5] Plaintiff's instruction No. 10 (App. F, p. 76a) inferentially suggested to the jury that any award of actual damages not exceeding the $1 million sued for would be proper.

CONCLUSION

If the constitutional guarantee of a free press is to mean anything as against a State Supreme Court which pays lip service to but ignores the decisions of this Court, this case must be reviewed.

Respectfully submitted,

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May 2, 1975

APPENDIX

APPENDIX A

Decision of the West Virginia Supreme Court

Filed February 4, 1975

Justices Haden and Sprouse, deeming themselves disqualified, did not participate in the consideration or decision of this case.

No. 13463

JAMES M. SPROUSE

v.

CLAY COMMUNICATION, INC.

Fayette County

Reversed in part,
affirmed in part,
remanded with
instructions.

NEELY JUSTICE

1. A candidate for political office is governed by the same rules with regard to recovery for libel as a public official and can sustain an action for libel only if he can prove that: (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were published with a reckless and willful disregard of truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material.

2. Where oversized headlines are published which reasonably lead the average reader to an entirely different conclusion than the facts recited in the body of the story, and where the plaintiff can demonstrate that it was the

intent of the publisher to use such misleading headlines to create a false impression on the normal reader, the headlines may be considerd separately with regard to whether a known falsehood was published.

3. Where a candidate for public office who is plaintiff in a libel action can demonstrate an overall plan or scheme, the object of which was to injure plaintiff through the publication of defamatory material, a deviation between the clear purport of defamatory headlines and the remainder of the news stories reciting facts not defamatory in nature, is evidence of reckless and willful disregard for truth which may be considered along with other evidence on the question of actual malice by the jury, and may be considered by an appellate court in reviewing a jury judgment under the First Amendment to the *United States Constition* as applied to the states by the Fourteenth Amendment.

4. In cases involving alleged libel of a candidate for public office by a newspaper where the protections afforded to the newspaper by the First Amendment to the *United States Constitution* as applied to the states by the Fourteenth Amendment must be jealously guarded, an award of punitive damages will be sustained on appeal only when it is determined that the jury's award of actual damages is inadequate to dissuade newspapers similarly situated from engaging in like conduct in the future.

5. In all future cases the dismissal of an action under Rule 12(b)(6) *W.Va. RCP* for failure to state a claim upon which relief can be granted shall be a bar to the prosecution of a new action grounded in substantially the same set of facts, unless the lower court in the first action specifically dismisses without prejudice; however, in the case *sub judice* a former dismissal in Kanawha County under Rule 12(b)(6) did not operate as a bar to a subsequent action in Fayette County because the record clearly

reveals that the action, although dismissed, was not dismissed on the merits, showing that the court intended to dismiss only the complaint.

6. Venue for alleged libel against a domestic corporation is properly laid in any county in which the libel was published regardless of the residence of the defendant and this rule is not changed by *W. Va. Code,* 59-3-1 [1967].

7. Where a jury instruction is improperly refused, and where it further appears to the appellate court that the case was tried on the correct theory and that the substance of the refused instruction was adequately covered in other instructions, and where it further conclusively appears to the appellate court that the outcome of the case would not have been affected by the giving of the refused instruction, the error is harmless and the case will not be reversed for refusal to give that instruction alone.

8. As a general rule a newspaper is protected by the First Amendment to the *United States Constitution* as applied to the states by the Fourteenth Amendment when it publishes in good faith the statements of candidates for office about their opponents, and in this regard a newspaper is not required to make an independent investigation of the truth of such assertions by opposition leaders; however, when it conclusively appears from the evidence that the newspaper published the statements of an opposition political leader as part of an overall plan or scheme to injure a political candidate, knowing that the quoted statements were false or misleading, and when it further appears that the newspaper acted independently by publishing such statement by an opposition leader under a headline libelous *per se* authored by the defendant newspaper, the jury may infer that the statement by the opposition leader was published with actual malice, in which case the First Amendment will not shield the defendant newspaper.

NEELY, Justice:

In the fall of 1968 James M. Sprouse was a practicing attorney in Charleston, West Virginia, and the Democratic Party candidate for Governor of the State of West Virginia. Approximately two weeks before the November election the *Charleston Daily Mail* published a series of articles implying that James M. Sprouse had engaged in real estate transactions in Pendleton County, West Virginia, of such a nature as to cast aspersions upon Sprouse's integrity. The articles implied that enormous profits would inure to Sprouse's benefit as a result of "inside" information which Sprouse acquired through his Democratic Party affiliation concerning plans of the United States Government to establish a national park at Seneca Rocks in Pendleton County. A complete text of the articles in question is reproduced in the appendix to this opinion and it is suggested that the articles be read in their entirety at this point in order fully to understand the application of the intricate law of libel to the facts of this case.

The plaintiff, James M. Sprouse, recovered a jury award in the Circuit Court of Fayette County for $250,000 actual damages and $500,000 punitive damages against Clay Communications, Inc., owner of the *Charleston Daily Mail*, a newspaper of general circulation in numerous West Virginia counties. The defendant, Clay, strenuously argued that under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny, the defendant is not liable for the statements made about Sprouse even though they were false because Sprouse did not prove actual malice, as that term is judicially defined in the law of libel by *New York Times*.

This appeal presents a question of first impression in the United States with regard to the law of libel in light of *New York Times* v. *Sullivan, supra*. The basic issue concerns whether evidence indicating that a newspaper foreswore its role as an impartial reporter of facts and joined

with political partisans in an overall plan or scheme to discredit the character of a political candidate is relevant in determining whether the newspaper acted in reckless and willful disregard of the truth when it published grossly exaggerated, defamatory headlines which were unsupported by the factual recitations in the body of the story. This Court holds that once an overall plan or scheme to injure has been established, an unreasonable deviation between headlines and the remainder of the presentation is in and of itself evidence of actual malice, which, along with other evidence, supports a jury verdict for libel.

In addition to defendant's First Amendment defenses including an allegation that the damages are excessive, defendant also assigns myriad procedural errors among which the Court considers three to be fairly raised. The first assignment of error raises the question of whether venue was properly laid in Fayette County; the second assignment presents the question of whether a previous action begun in Kanawha County alleging the same set of facts and dismissed under Rule 12(b)(6) *W.Va. RCP* was an effective bar to the present action in Fayette County; and, the third assignment of error concerns the failure of the trial court to give two jury instructions.[1]

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[1] The Court has considered in detail the following additional assignments of error raised by petitioner, namely, that the trial court erred: (1) in overruling petitioner's objection to plaintiff's use and display before the jury throughout the course of trial of "placards" or "blowups" of the publications in question; (2) in denying petitioner's motion for a mistrial made at the conclusion of the opening statement of counsel for plaintiff on the ground of improper remarks by counsel; (3) in permitting the admission of certain tangible and testimonial evidence; (4) in permitting counsel for plaintiff to question witness Robert Mellace as a hostile witness; (5) in giving and reading to the jury plaintiff's instructions numbers 1, 2A, 3, 5, 7 as amended, 8B, 10, and 10A; (6) in refusing petitioner's instructions numbers 1, 2, 6, 10, 15, 16, 18, 20, 21, 22, 23, and 24 and part of 3; (7) in refusing to submit special interrogatory "A" to the jury; (8) in permitting plaintiff's coun-

This Court finds that there was no reversible error committted, and further finds that although the $750,000 damage award is excessive, the plaintiff proved libel in this case. Accordingly, the judgment is reversed in part and affirmed in part and the case is remanded to the Circuit Court of Fayette County with instructions to enter judgment for $250,000 actual damages plus interest and costs and to strike as a matter of law the award of $500,000 punitive damages.

Under the mandate of *New York Times* v. *Sullivan*, supra, it is incumbent upon an appellate court in determining the validity of a libel judgment both to consider the law and to make an independent evaluation of the evidence to insure First Amendment protection to publishers. A candidate for political office is governed by the same stringent rules with regard to recovery as a public official. *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265 (1970). In order for a political candidate to recover for libel against a newspaper it is necessary that the candidate prove actual malice, i.e., prove either that the newspaper published false or misleading defamatory statements knowing that they were false or misleading, or that the newspaper published such statements with a reckless and willful disregard for their truth. *Monitor Patriot Co.* v. *Roy*, supra.

In the law of libel the word "malice" has an entirely different connotation from its general meaning in other areas of tort law. *Cantrell* v. *Forest City Publishing*. 95 S.Ct. 465 (1974). In libel actions "malice" does not connote the mere dislike of one party for another or the intent

sel to exhibit to the jury during closing argument special interrogatory "B"; (9) in denying petitioner's motion for a mistrial made at conclusion of closing statement by counsel for plaintiff on the ground of improper remarks by counsel. Upon consideration the Court is of the opinion and does find that the assignments are without sufficient merit to be considered fairly raised, and accordingly the above assignments are summarily dismissed.

of one party to injure another. It is acknowledged, for example, that a political campaign necessarily involves intent on the part of one political group to "injure" opposition candidates by depriving them of elective office. In libel law "malice" has a much narrower definition and requires not only deliberate intent to injure, but also an intent to injure through the publication of false or misleading defamatory statements known by the publisher or its agents to be false, or an intent to injure through publication of such defamatory statements with reckless and willful disregard for their truth.

Consequently, in order for the evidence in this case to withstand appellate review it is necessary that the plaintiff, Sprouse, demonstrate that the defendant *Daily Mail* knew that the defamatory material contained in the articles it printed was false or for plaintiff to demonstrate that the *Daily Mail* was reckless and willful in its indifference to the truth of the printed material. In this regard the case *sub judice* is unique in the annals of reported libel cases because it primarily involves the deliberate use of misleading words in oversized headlines rather than outright false statements. For example, the use of the headline words "land grab," "dummy firm," "bonanza," "disclosed," and "cleanup" are not libel *per se* and are all susceptible to varying interpretations. Obviously, the discovery of a five dollar bill on the sidewalk by a vagabond is a "bonanza," while a similar discovery on the part of a senior executive is not a "bonanza." However, there is one headline over a story quoting plaintiff's opponent, Arch A. Moore, Jr., "Dummy Firm Seen Proving Corruption," which is probably libel *per se*.

The defendant argues that most of the material published was true in that: (1) Sprouse was the president of a New York corporation; (2) the corporation was engaged in land dealings in Pendleton County; (3) the corporation was making profits; and (4) the owner of Seneca Rocks

was offered a small sum for his property. Consequently the plaintiff's cause of action must be grounded not in the basic substance of the articles but rather in the dramatic and misleading defamatory characterization of mundane facts, primarily in headlines, which would lead the ordinary reasonable mind to a false conclusion.

The evidence strongly supports a jury inference that the defendant knew the conclusions to be drawn from the headlines were false and further that the defendant anticipated that these false conclusions would logically follow from its presentation. The Court's decision in this case, therefore, concerns two separate questions regarding the headlines. First, the question must be resolved concerning whether the headlines taken alone can be considered defamatory without regard to mitigating material in the body of the story, and second, the question must be resolved concerning whether the mere existence of misleading headlines unsupported by the body of the story is evidence of intent to injure through publication of false, defamatory statements known at the time of publication to be false.

The evidence in this case presents a problem which might be better analyzed with reference to a hypothetical situation. Let us suppose that a public figure, John Doe, frequently participated as a leader for a Boy Scout troop and as a coach in a Little League baseball program. If those facts are beyond dispute, is it nevertheless libel for a newspaper to describe Mr. Doe's participation in those programs under a headline "Doe's Association with Young Boys Seen as Suspect"? The law appears to be that the truth of the facts presented under the headline would not be a defense to libel, because the obvious intent of the headline is to convey a suspicion of homosexuality which is defamatory and an unreasonable inference from the observed facts. Although such a headline is not libel *per se* it would have the same effect as the simple state-

ment "Doe is a homosexual" which would be libel *per se*. In the simple hypothetical case, which is in all respects parallel to the case *sub judice*, the existence of such a headline unsupported by facts leading to an inference of homosexuality is evidence which may be considered by a jury on the question of malice. While alone the inconsistency between the headline and story would not be sufficient to support a libel action, such inconsistency would be one valid link in the chain of proof necessary to support a claim of (1) a false statement, (2) defamatory in nature, (3) known at the time of publication to be false, and (4) published with an intent to injure. Obviously, in the absence of other evidence demonstrating a plan or scheme to injure, mere lack of reasonableness with regard to the headline being a fair summary of the story, or even gross negligence, would not sustain a cause of action by a candidate for office. *Gertz* v. *Welch*, 418 U.S. 323 (1974).

In the case at bar the evidence disclosed that approximately two weeks before the publications in question, William Loy, then campaign manager for Arch A. Moore, Jr., Sprouse's election opponent, and Norman Yost, media manager for the Moore campaign, visited the office of the *Charleston Daily Mail* with information that Sprouse had engaged in land transactions in Pendleton County, West Virginia, through a corporation known as Selmet Properties, Inc. Loy and Yost conveyed this information to Jack Maurice, Robert Mellace, and Vincent Jennings, all editors of the defendant newspaper. On October 22, 1968, accompanied by members of the Moore campaign staff, Mellace went to the U. S. Forest Service office in Elkins, West Virginia and spoke to the senior officer in charge. While in Elkins, Mellace also spoke with the land officer who had negotiated an acquisition of 1,385 acres from Selmet Properties by Nature Conservance, Inc., a non-profit corporation in Washington, D. C., organized to buy land which federal agencies wish to acquire for public recreational purposes. Nature Conservancy buys the land and later

sells it at a cost to the agencies when such agencies acquire the necessary funds.

Mellace learned from his trip to Elkins that a corporation named Selmet Properties, Inc. was incorporated in the State of New York February 25, 1965, by Jerome Gromet-stein, a New York attorney. He further learned that the principal office of the corporation was in New York City, and that Selmet had purchased approximately 2,900 acres of land in Pendleton County from Henry Regnery on March 12, 1966 for $134,620. Mellace then discovered that through June 7, 1966 Selmet had sold seven parcels of land to various individuals, and had violated West Virginia law by buying and selling land before Selmet qualified to hold property and do business in West Virginia. Papers later filed in the office of the West Virginia Secretary of State on August 25, 1966, more than two years before publication, qualifying Selmet to do business in West Virginia, were signed by Sprouse as president of Selmet, and the principal West Virginia office was then listed as 700 Terminal Building, Charleston, West Virginia, where Sprouse practiced law.

Mellace went to the Pendleton County Courthouse and determined that after Selmet sold 1,385 acres to Nature Conservancy for $81,364, there appeared to remain 400 acres from the original Regnery purchase. At the time of Mellace's investigation the total income of record derived by Selmet from sales of the Regnery property was $182,796.25 or approximately $48,176.75 more than its purchase price for the land. There is no evidence in the record that Mellace did not honestly believe that there were still several hundred acres left in the original tract, although at trial it was demonstrated that only 87.09 acres actually remained. The plaintiff was unable to negate the fact that subtraction of the out conveyances of record from the total acreage stated in the original Regnery tract deed appeared to leave approximately 400 remaining acres, and therefore Mellace's

good faith belief in his calculations at the time of publication was not called into question.

Consequently, in the defendant's favor there was evidence that the newspaper believed the following facts: (1) Selmet Properties, Inc. was incorporated in New York State; (2) the corporation had conducted several routine transactions in West Virginia before qualifying to do business in the State; (3) after qualifying to do business the corporation had sold 1,385 acres of land to Nature Conservancy, Inc. for $81,364; (4) at the time of publication the corporation had made a profit of $48,176.75 of its initial investment; (5) Sprouse was president of the corporation; and, (6) there appeared to be several hundred acres of land still remaining in the original tract.

In support of plaintiff's case, however, the defendant newspaper also knew: (1) Sprouse had never hidden his participation in the corporation;[2] (2) there was no "inside"

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[2] Testimony of plaintiff James M. Sprouse on cross-examination:

> Q. Now, early in the campaign, Mr. Sprouse, I believe in March, 1968, you made a public disclosure of what you said was an itemization of your income during the years 1963 to 1966, an itemization of your assets, including real property, stocks, and some personal property, even including an automobile; is that correct?
>
> A. I issued such a statement, sir, I don't know the date.
>
> * * * * *
>
> (Defense counsel then read aloud the text of a news article printed in the *Charleston Gazette*, a rival newspaper of the *Daily Mail* in Charleston, which contained an extensive list of Spouse's assets and income, among which was included the item "interest in forestry acreage, Pendleton County, $10,000.")
>
> * * * * *
>
> Q. Now, would you not admit or agree with me on reflection, and after the event, had you disclosed to the public in that release March of 1968, that you owned a certain percentage of the shares of stock of Selmet Corporation which owned a large tract of land in Pendleton County, which it had purchased at a cost of $134,000, and that the corporation owed

information available to Sprouse which was not generally available; (3) the corporation had qualified to do business before engaging in any major transactions and was qualified to do business at the time of publication; (4) out-of-state firms frequently do legitimate business in West Virginia; (5) Sprouse was in no way connected with or responsible for the small offer made by the U.S. Government for the purchase of Seneca Rocks from the local owner; and (6) the remaining land owned by Selmet Properties was at least five miles from the Seneca Rocks landmark which was pic-

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the bank a certain sum of money, making the net value of the value of your stock, a certain figure, that you would never have had these news stories in this campaign?

A. No, sir, I don't agree with you on that. I think no matter what I had put, if I had put that same information, the Daily Mail could have done the same hatchet job based on that same information.

Q. But, you see, in this story you said you, James Sprouse, had interest in forestry acreage in Pendleton County, value of $10,000. Now, would not the ordinary person construe that to mean that you, as an individual, owned some ...al property which was primarily of value only for timber and that it would be in your name on the property books, either alone or with co-tenants?

A. I can't say what the ordinary person would think, Mr. Chambers. My intention was to give a fair disclosure of what I owned there, and that's what I tried to do. I think at the time it was just about the value of the investment I had.

* * * * *

Q. Where did you publicly reveal your connection with Selmet Corporation before it became public knowledge on August 24, 1968?

A. In 1968?

Q. Yes.

A. When I registered—we registered with the Secretary of State and my name was listed as an officer. I signed all of these deeds as president. That was a public record. And when I signed all of these deeds, this was a public record. When I applied for a loan at the bank and we told them what it was for, everybody that wanted to know anything about it, obviously. I was proud of being associated with it. It wasn't anything I wanted to conceal.

tured in the newspaper photograph under the caption "Where Governor Candidate 'Cleans up.'"[3]

On October 24 and 25, 1968, the *Charleston Daily Mail* published a series of articles with very large headlines as follows:

"PENDLETON REALTY BONANZA
BY JIM SPROUSE DISCLOSED"

"Cleanup of Nearly $500,000 in View"

"Seneca Rocks Tourist Project Property
Enriching Candidate Sprouse"

"Sprouse Owns Choice Land Beside $30
Million U.S. Resort"

In addition to the *Daily Mail's* own commentary with regard to the land transaction, the paper printed extensive comments from Sprouse's opponent, Arch A. Moore, Jr., casting aspersions on Sprouse's honor and integrity. The largest headline in this regard said:

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[3] This conclusion with regard to the evidence is either supported in the body of the articles themselves or from testimony at trial. Testimony of Robert Mellace:

Q. Getting back . . . the story says "cleans up", "WHERE GOVERNOR CANDIDATE 'CLEANS UP'", October 25th.

A. The headline.

Q. The headline over Seneca Rocks, where Sprouse cleans up.

A. That is what it says.

Q. It is over a picture of Seneca Rocks, isn't it?

A. Yes.

Q. He [Sprouse] didn't even own Seneca Rocks, did he?

A. I don't think—Mr. Harper owned the Rocks, I think.

Q. Mr. Mellace, are you telling the Court and jury that people reading "WHERE GOVERNOR CANDIDATE 'CLEANS UP'" would not think it referred to the picture?

A. The general area.

Q. The general area is 10 miles from Seneca Rocks.

A. That's the general area.

"MOORE ASKS FEDERAL PROBE IN SPROUSE'S LAND GRAB"

followed in smaller headlines by a statement which was libel *per se:*

"'Dummy Firm' Seen proving Corruption"

In the October 25th edition of the *Mail* there appeared a composite picture of Seneca Rocks with the large headline:

"WHERE GOVERNOR CANDIDATE 'CLEANS UP'"

below which appeared a picture of an obviously worthy looking country gentleman and a story headlined "Fortune To Jim Sprouse But Pittance For Seneca" implying that the gentleman in the picture was suffering financially as a result of improprieties on the part of candidate Sprouse.

There is no evidence in the record offered by the defendant that any member of the *Daily Mail* staff had reason to believe that Sprouse was actually engaged in a fraudulent transaction.[4] Although to persons untrained in business,

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[4] Testimony of Mr. Jack Maurice, one of the editors of defendant newspaper, who reviewed the articles prior to publication:

Q. Now, Mr. Mellace [sic]—Mr. Maurice, you agree, do you not, and you concluded after investigation, that there was no advance or inside information that Judge Sprouse was the beneficiary of in connection with the land purchase and subsequent sales in the Pendleton land area?

A. We concluded that we had nothing to suggest that he had any advance information.

Q. And you had nothing to suggest that that transaction, the purchase and sale of real estate in Pendleton County was in any way tainted with illegality or criminality of any kind; that's true, isn't it?

A. That is true, sir.

Q. You don't contend that?

A. No, sir.

Testimony of Mr. Robert Mellace, editor of defendant newspaper and author of the articles complained of:

Q. As I understand it, Mr. Mellace, you don't contend that Judge Sprouse had inside, advance information on this property, do you?

A. No, sir, I don't contend that.

the existence of an out-of-state corporation might appear to be a "dummy firm," the jury were entitled to infer from all the evidence presented that the staff of the *Daily Mail* deliberately characterized a legitimate corporation by the pejorative term "dummy firm" to conjure up the image of a conduit for illegal money when the defendant knew for an absolute certainty that the business was routine and legitimate.

The parties have cited numerous cases concerning whether headlines should be considered as an integral part of the news story, *DeHusson* v. *Hearst Corporation*, 204 F. 2d 234 (7th Cir. 1953), *Afro-American Publishing Co.* v. *Jaffe*, 366 F.2d 649 (D.C.Cir. 1966), or may be considered separately on the issue of whether the statements in question are defamatory. *Empire Printing Co.* v. *Roden*, 247 F. 2d 8 (9th Cir. 1957), *Las Vegas Sun* v. *Franklin*, 329 P.2d 867 (Nev. 1958). The Court is of the opinion that no clear-cut rule has been established in this regard for headlines which are not libel *per se*, and therefore, each case must be considered on its facts. Generally where the headline is of normal size and does not lead to a conclusion totally unsupported in the body of the story, both headlines and story should be considered together for their total impression. However, where oversized headlines are published which reasonably lead the average reader to an entirely different conclusion than the facts recited in the body of the story, and where the plaintiff can demonstrate that it was the intent of the publisher to use such misleading headlines to

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Q. You don't contend, do you, Mr. Mellace, that way back in February, 1965, when this corporation was formed by Mr. Sprouse and a [former] classmate at Columbia [University Law School], that it was done for the purpose of buying real estate to sell to the U.S. Government? Do you contend that?

A. No, sir.

Q. Let me ask you something, Mr. Mellace: Do you contend now that this corporation was formed or connected with any Act of Congress passed in March, 1965?

A. No, sir.

create a false impression on the normal reader, the headlines may be considered separately with regard to whether a known falsehood was published. As the court said in *Afro-American Publishing Co.* v. *Jaffe, supra,* at p. 655 "[w]hat counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes of a reader of average interest."

It is important that this entire case be viewed against a background of events which occurred in West Virginia during the late 1960's when rather widespread corruption was exposed in State government. This corruption ultimately led to federal prison terms for numerous high-ranking officials, including a former Governor and a former Attorney General of West Virginia. Therefore, the public was particularly sensitive to allegations of political graft. The record sustains the jury inference that it was the intent of the editors of the defendant newspaper to take advantage of the climate of the times with regard to public sensitivity concerning graft to further the ends of their own candidate, Arch A. Moore, Jr. by impugning the integrity of the plaintiff, Sprouse.[5]

[5] Testimony of Robert Mellace, editor of defendant newspaper and author of the news stories complained of:

> Q. Did you come about it [the story of the land transactions] originally by way of investigation?
>
> A. No, I did not.
>
> Q. As a matter of fact, did it not come from William Loy and Norman Yost, who at that time were directors and managers of the Republican campaign who came to your office and gave you information they wanted to have published? That is true, isn't it?
>
> A. They did come to my office. What their titles were, I don't know. I know both of them were working for Arch Moore, and today continue to work for the Governor. I think Yost was his publicity man and Mr. Loy was his campaign director. Mr. Yost has a newspaper background and Mr. Loy, a lawyer, worked in Washington with the Governor when he was a congressman. That is true, they did come to me, yes, sir.

The Supreme Court of the United States has given very little guidance with regard to a situation of this type. Re-

Regarding the state-wide circulation of the stories about Sprouse to other newspapers, Mr. Mellace testified as follows:

> Q. Mr. Mellace, when you published this first story, rather after this story was written and before it was published, did you have occasion to show it to Mr. Yost?
>
> A. I showed Mr. Yost a carbon copy of it.
>
> Q. That was before it was published?
>
> A. It was before it appeared in the Daily Mail, like, well, an hour and a half.
>
> Q. And he was one of the [Moore] campaign aides who planted the story with your newspaper?
>
> A. He was one of those who suggested there might be a story, yes, sir.
>
> * * * * *
>
> Q. And you gave it to him so he could get circulation by sending it to other newspapers, didn't you?
>
> A. Well, yes. He asked us if it would be all right if he called other newspapers. We told him it would be all right if it was a paper that would not appear before the Daily Mail. After it appeared in the Daily Mail, we didn't care who used it.
>
> Q. You don't normally and routinely do that, give Mr. Yost the story Daily Mail writes for publication in other papers, do you?
>
> A. This was not a routine story.
>
> * * * * *
>
> Q. I am talking about routine practice, you don't routinely give Mr. Yost your publications to have him disseminate them?
>
> A. This is the only time that has ever happened.

Testimony of Mr. Norman Yost, publicity director in the campaign of Arch A. Moore, Jr., the plaintiff's opponent in the gubernatorial election, and one of the men who took information to the defendant newspaper for publication:

> Q. Mr. Yost, when did you first come about the information that Judge Sprouse owned an interest in real estate in Pendleton County?
>
> A. The first information came about eight weeks, possibly ten weeks before the election in the form of rumor or of somebody reporting this information.
>
> Q. . . . After you received this information, did you have occasion to go to any newspaper and seek its publication?
>
> A. This information, basically, was provided by Mr. Loy.

ported U.S. Supreme Court cases almost exclusively concern newspapers operating as independent, news-gathering agencies. The purpose of First Amendment protection for newspapers as interpreted by the U.S. Supreme Court is to engender wide-open, robust, and uninhibited political discussion. *New York Times* v. *Sullivan, supra.* Therefore, the Court holds that it is relevant to this case that the *Daily Mail* did not publish the stories in question exclusively as a news-gathering agency.

The cases of *Curtis Publishing* v. *Butts*, and its companion case, *Associated Press* v. *Walker*, 388 U.S. 130 (1967)

And when Mr. Loy had secured certain documents that he felt were vital to the campaign, I did go to the Charleston Daily Mail.

* * * * *

Q. Now, Mr. Yost, how many times did you personally visit and speak with the editor or associate editor, or any officials of the Daily Mail about publication of this story?

A. This particular story?

Q. Yes.

A. I had one conference in which Mr. Loy, Mr. Jennings, Mr. Maurice, Mr. Mellace was present, and I believe that was the only time I was there for this purpose or any connection therewith.

* * * * *

Q. And when you received the story, what did you do with that story?

A. . . . I immediately called my staff together and asked them to help me distribute this story throughout the State.

* * * * *

Q. Could you tell us what newspapers, and I see you didn't bring notes with you, but as best your memory can serve you, can you tell us what newspapers carried this story that you and your staff circulated?

A. . . . I didn't have a clip sheet at this time of the newspapers that did, but I assume that we hit every afternoon newspaper. That would be our purposes.

Q. And I take it, as an experienced news man, you knew what newspapers to call to give the story to?

A. Yes, because a news story, it is something that has to be delivered fresh. And if it is not fresh it is not news.

stand for the proposition that when a newspaper departs from an attempt to report the news objectively, the fact of such departure can be considered by the jury and an appellate court in determining whether there was willful disregard of truth. In *Walker* the Associated Press received incorrect information from a correspondent who was present at the scene of events and who gave every indication of being trustworthy and competent. The Court reversed a judgment in favor of General Walker and held that a public figure may recover damages for defamatory falsehood only on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily followed by responsible publishers. Therefore, the Supreme Court held that the Associated Press was not liable for publishing an isolated defamatory dispatch concerning General Walker when it was operating under acceptable standards of good journalism. The issue in *Walker*, therefore, can be distinguished from the issue presented in the case at bar in that in *Walker* there was no evidence of participation by Associated Press in a plan or scheme to injure Walker.

The facts in the case at bar are far closer to the facts of *Curtis Publishing* where recovery was sustained by the Supreme Court partially because of the publisher's personal motives for printing the libel. In *Curtis*, a case involving a defamatory story about a football coach which appeared in *The Saturday Evening Post*, the Supreme Court sustained recovery by the plaintiff because the *Post* had deviated from generally accepted standards of responsible reporting in order to print a sensational story. Although it was not demonstrated that the *Post* knew the statements were false, the evidence disclosed that the *Post* had published highly defamatory statements upon very unreliable evidence. As Mr. Justice Warren characterized the facts in his concurring opinion:

> "Apparently because of declining advertising revenues, an editorial decision was made to 'change the

> image' of the Saturday Evening Post with the hope that circulation and advertising revenues would thereby be increased. The starting point for this change of image was an announcement that the magazine would embark upon a program of 'sophisticated muckraking,' designed to 'provoke people, and make them mad.' "

This Court recognizes that recent cases would appear to withdraw from the standard of 'highly unreasonable conduct' enunciated by *Curtis*. Dicta in the recent opinion in *Gertz* v. *Welch, supra,* indicates that mere deviation from accepted standards of journalism alone will not support an action for libel brought by a public figure. Nevertheless when *Walker* and *Curtis* are read together they still stand for the proposition that personal motives on the part of a newspaper, or participation by a newspaper in a plan or scheme to injure, is evidence of recklessness and willful disregard for truth which may be considered along with other evidence on the question of actual malice.

The information gathered by the *Daily Mail* reporters contained no facts indicating that Sprouse had engaged in anything other than a normal business transaction and there was no evidence discovered by the defendant at the time of publication of inside information as a result of political affiliation. In summary, the testimony at trial contained no evidence that the reporters of the *Mail* at the time of publication believed there existed any impropriety whatsoever.[6]

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[6] Testimony of Mr. Marvin N. Marshall, who at the time the articles were printed was Land Staff Officer of the Monongahela National Forest, and who was one of the federal officials to whom Mr. Mellace spoke during his investigatory trip to Elkins:

> Q. Did Mr. Mellace make any statements, or did he ask any questions of you or of Mr. Olliver, in your presence, regarding the transaction which is the subject of this lawsuit?
>
> A. Yes, sir.
>
> Q. What were those questions?
>
> A. The questions concerned the amount of acreage in the transaction, the amount of land that was left in the ownership of Selmet Corporation, and values of the land.
>
> • • • • •

The conceptual difficulty in this case arises from the ability of different people to draw varying inferences from observation of the same set of facts. For example, it is possible for one person to observe a man running from a bank and conclude that he is involved in a bank robbery and for another person to observe the same act and conclude that the man is late for an appointment. Much discussion in politics and government concerns different conclusions derived from observation of the same random facts. Accordingly, great latitude must be given a newspaper to report observed facts and to make legitimate, negligent, or even grossly negligent inferences from those facts. Had the *Charleston Daily Mail* confined itself to reporting the facts

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> Q. Do you know how many acres that tract consisted of? That is, in the residual?
>
> A. 87.09.
>
> • • • • •
>
> Q. Was there any discussion, either statements made or questions asked by Mr. Mellace on that occasion regarding the acreage still belonging to Selmet?
>
> A. Yes, sir.
>
> Q. What were those, or what was that?
>
> A. Mr. Mellace indicated there was larger acreage than that residual, and I attempted to show him from our records that there was less acreage than that, than that he indicated.
>
> Q. Did you tell him what acreage was left?
>
> A. I told him, in my opinion, it was less than 100 acres.
>
> Q. Did he indicate to you . . . how many acres he thought was left?
>
> A. Approximately 400 acres.
>
> Q. Now did you, sir, have a discussion with him as to the value per acre, or otherwise, of the residual tract?
>
> A. Yes, sir.
>
> Q. What was that discussion?
>
> A. He indicated the values were around $1,000 an acre, and I indicated that, in my opinion, having seen land sell in that area, that it would be nearer $500 per acre.
>
> • • • • •
>
> Q. Now, insofar as Mr. Mellace in his story, Mr. Olliver [sic], I don't find any place he quotes you, but insofar as it quotes Mr. Olliver, or attributes statements to the Forest Service, is this story basically accurate?
>
> A. Not in my opinion.

of the Pendleton County land transactions in temperate terms, and, had it stated that further investigation might prove this transaction suspect, the *Mail* would have been protected under the First Amendment. *Monitor Patriot Company* v. *Roy, supra.* Defendant would even have been protected from liability for negligent misleading headlines, but not from intentional misleading headlines.

Obviously, as the U.S. Supreme Court frequently notes, there is great tension between (1) government by free discussion as assured by the First Amendment, and (2) the protection of individuals from libel. Historically since *New York Times* the clearest legal principle emerging from a reading of libel cases is that each case must be considered by an appellate court on its facts with a strong sympathy toward protection of the robust political discussion contem-

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Testimony of Mr. Robert Mellace:

Q. As a matter of fact, this company, even though it did qualify after it began to sell properties, was licensed to do business in the Office of the Secretary of State in the State of West Virginia; you had that information didn't you?

A. Yes.

Q. Bill Loy gave that to you?

A. Either that or I acquired it myself. . . .

Q. As far as the records of the Secretary of State are concerned, nothing Judge Sprouse did concealed his identity or connection with the Selmet Company, did it?

A. Not to my knowledge, no, sir.

* * * * *

Q. Insofar as your word "disclosed," there was nothing to suggest that Judge Sprouse in qualifying that company did anything to submerge his identity in any fashion or character, was there?

A. I completely accept responsibility, Rudy, for these headlines, but I did not write them.

* * * * *

Q. Mr. Mellace, absent any available knowledge and absent any inside information, do you admit that this was a legitimate real estate transaction . . .?

A. It was basically legitimate as far as I know, and I never said otherwise.

plated by the First Amendment. At some point, however, cumulative evidence will show that the line of protection is breached, and a jury must be permitted to find malice, unless we are to adopt the position, articulated by Mr. Justice Black and Mr. Justice Douglas, that proper application of the First Amendment provides an absolute defense for the press to all defamation actions.[7]

In the case at bar the defendant crossed the line. The evidence supports a jury inference that the *Mail* went beyond drawing conclusions from observed facts and knowingly used the pretext of a legitimate business transaction to lead the electorate to what it again *knew* to be a false conclusion. Use of headline words such as "bonanza," "disclosed," and "cleanup," demonstrate an intent on the part of the newspaper to capitalize on the well known habit of newspaper readers of reading only the headlines. The defendant demonstrated that the headlines were written by news staff other than the authors of the stories, but *Cantrell* v. *Forest City Publishing, supra,* holds that once an overall scheme of recklessness has been demonstrated, *respondeat superior* applies in libel as well as other areas of tort law and the publisher is liable for the acts of employees. The defendant did not demonstrate that Mellace was ignorant of the content of the headlines before they were published, and the jury were entitled to infer that even if Mellace were ignorant of misleading headlines before publication on the 24th, those headlines were effective notice of the problem of irresponsible headlines which recurred in the publication of similar misleading headlines on the 25th.

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[7] See: *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), Black concurring, at p. 293; *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), Black concurring, at p. 79, and Douglas concurring, at p. 80; *Rosenblatt* v. *Baer*, 383 U.S. 75 (1966), Douglas concurring, at p. 88, and Black concurring and dissenting, at p. 94; *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967), Black concurring and dissenting, at p. 170.

The story in the October 25th edition of the *Mail* in which there appeared a picture of a worthy country gentleman, Mr. D. C. Harper, with the headline "Fortune to Jim Sprouse Pittance for Seneca" and the sub-headline "Landmark's Owners Plan Court Fight Against Deal," supported a jury conclusion that there was a deliberate effort to imply that the profit to Sprouse was acquired at the expense of an honest farmer, rather than in a wholly independent transaction. The *Mail* was unable to demonstrate that either Mellace or any other member of its staff had reason to believe at the time of publication that Mr. Harper in any way suffered as a direct result of Selmet's dealings with Nature Conservancy, Inc. Therefore, the plaintiff proved that this story was false or misleading, and that it was published with knowledge that it was false or misleading.[8]

This Court is concerned that our decision in this case may ultimately result in self-censorship by newspapers. Particularly in West Virginia, where a large portion of the State is served by newspapers which lack substantial financial assets, the threat of potential libel actions becomes repressive, not only because of possible judgments but also because of the inordinate legal expenses normally incurred in defending a protracted libel suit. Therefore it should be emphasized that the Court sustains the jury's finding of libel in this case because the plaintiff proved that the newspaper

[8] Testimony of Mr. Robert Mellace:

Q. Now, I am asking you sir, isn't it true that D.C. Harper did not plan any court fight against any deal that this has reference to?

A. Not to my knowledge.

Q. As a matter of fact, Mr. Mellace, that story or that headline was printed, 'Landmark's Owners Plan Court Fight Against Deal,' so that the common interpretation would be that he was planning a court fight against Judge Sprouse, wasn't it?

A. Well, my interpretation of that was that he was planning a fight against the U.S. Forest Service for not giving him enough for his land. I never connected Mr. Harper with the fight against Judge Sprouse's firm.

abdicated its traditional role of fairly reporting the news and became a participant in a scheme or plan, the object of which was to employ grossly exaggerated and patently untrue assertions, embodied primarily in headlines, to destroy the character of Sprouse.[9] it appears from the evidence that

[9] The testimony of Mr. Robert Mellace supports this conclusion. RE: "Disclosed."

Q. Now, Mr. Mellace, the word "disclosure" is used in your news story. I speak specifically now, of the headline appearing on October 24, 1968: "Pendleton Realty Bonanza by Jim Sprouse Disclosed."

A. Yes, that is there.

* * * * *

Q. As far as the records of the Secretary of State are concerned, nothing Judge Sprouse did concealed his identity or connection with that Selmet Company, did it?

A. Not to my knowledge, no, sir.

* * * * *

Q. "Disclosure," you would agree, suggests there was something to be disclosed that the public didn't know about, isn't that true?

A. Yes, sir.

* * * * *

Q. Would you admit that there was no effort on behalf of James M. Sprouse to conceal or submerge his identity up until the time of the story?

A. I don't know of any.

* * * * *

RE: "Land Grab."

Q. The story planted by the campaign, and that was the story of October 24, 1965 [sic], and he called a press conference, and you printed and published a statement he made—I am talking now about the story of October 25th, "Pendleton Land Grab." In the headlines you used the words "Land Grab"?

A. The Daily Mail did.

* * * * *

Q. And "land grab," Mr. Mellace, means, does it not, the seizure of real estate or seizure of land illegally or underhanded, does it not?

A. I don't know, again these are not my words.

* * * * *

not only did the *Mail* work closely with the Moore campaign staff to discover the details of the land transaction, but also that it fully cooperated in disseminating the articles to other newspapers for publication throughout the State. Under those circumstances the difference between the fair

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Q. You will agree, will you not, Mr. Mellace that this was not a land grab? Was it?

A. In the sense that Jim stole land or grabbed it?

Q. Yes.

A. No, but, again, that is not my word.

* * * * *

RE: "Dummy Firm."

Q. You published a sub-headline "Dummy Firm Seen Proving Corruption." Your newspaper published that?

A. Yes, sir. And, again, those are Governor Moore's words.

Q. You agree, do you not, this was not a dummy firm by any definition of the word?

MR. CHAMBERS: "Objection. I think the evidence will how whether it was or not. I don't think the witness is qualified to answer that question."

* * * * *

THE COURT: "This objection is overruled. You can answer the question."

* * * * *

A. My definition of a dummy firm or dummy corporation would be one that was formed covertly to hide the identity of officers doing business in that corporation, but I can't make any conclusion about why this corporation was formed.

I just know in my own mind that it was formed outside the State of West Virginia and the only business it has done was in the State of West Virginia. When it first started doing business in West Virginia, it did not, as required by law, register with the West Virginia Secretary of State.

Q. Mr. Mellace, I agree with you, it registered late, but when it registered, it registered two years and one month before this property was sold to Nature Conservancy, in August 1966, and the property was sold in October, 1968.

A. Okay.

* * * * *

Q. After it registered with the State of West Virginia it did not violate laws in the State of West Virginia did it?

A. Not to my knowledge.

implication of the headlines as opposed to the supporting factual recitation of the stories is evidence alone of malice, which absent evidence to the contrary, supports the jury verdict.

RE: "Court Fight."

Q. Now, Mr. Mellace, if I might direct your attention to another story on October 25th. We have here the introductory headline, "Landmark's Owners Plan Court Fight Against Deal."

A. That is what it says.

Q. Now, I am asking you, sir, isn't it true that D.C. Harper did not plan any court fight against any deal that this has reference to?

A. Not to my knowledge.

Q. As a matter of fact, Mr. Mellace, that story or that headline was printed, "Landmark's Owners Plan Court Fight Against Deal." so that the common interpretation would be that he was planning a court fight against Judge Sprouse, wasn't it?

A. Well, my interpretation of that was that he was planning a fight against the U.S. Forest Service for not giving him enough for his land. I never connected Mr. Harper with the fight against Judge Sprouse's firm.

* * * * *

Testimony of Mr. Wilson Smith, real estate broker from Elkins who negotiated the sale of the original 2,900-acre Regnery tract to Selmet:

Q. Mr. Smith,—you are familiar, I take it, with that area, are you not?

A. Yes, sir.

* * * * *

Q. There is a headline there where "Governor Candidate Cleans Up." Does that property contain the Seneca Rocks? [The news photograph that appeared in Daily Mail Story was shown to witness] Is that Seneca Rocks on that property?

A. No, sir.

Q. How far away is the property that you all purchased from Seneca Rocks or from where "Governor Candidate Cleans Up"?

A. At least five miles—nine miles.

Q. And the Rocks had nothing to do with the property?

A. No, sir.

II

The Court agrees with the defendant's contention that the jury award of $250,000 actual damages and $500,000 punitive damages is excessive. Under the recent U.S. Supreme Court case of *Gertz* v. *Welch*, *supra*, it is permissible for a plaintiff in the position of Sprouse to recover punitive damages because of the high standard of proof required of a candidate for public office to sustain any action for libel. As it is necessary for a candidate for office to prove that false or misleading statements were published with knowledge on the part of the publisher of their falsity or with willful and reckless disregard of their truth, and further to prove that they were published with a deliberate intent to injure, punitive damages may be recovered .

However, regardless of the law of this State, it would appear that the penumbra of protection of the First Amendment is such that punitive damages may only be recovered in cases where the award of actual damages is insufficient to dissuade others in like circumstances from committing similar acts in the future. The policy embodied in the First Amendment of encouraging broad dissemination of public information forecloses an award of punitive damages which might jeopardize the existence of a newspaper when such damages are unnecessary to protect the public from similar conduct in the future or to make possible the vindication of plaintiff's rights in the absence of demonstrable actual damages. In the case at bar the Court is of the opinion that an award of $250,000 actual damges is adequate for the purpose of dissuading publishers from similar willful and reckless conduct in the future. In addition the Court is persuaded that an award of $750,000 would have a chilling effect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which it has been the object and purpose of the United States Supreme Court to prevent since *New York Times* v. *Sullivan, supra.*

In viewing all of the evidence the Court is of the opinion that the plaintiff proved $250,000 in actual damages. The case of *Gertz* v. *Welch* specifically recognizes that actual loss to a plaintiff in a libel action is difficult to prove in the same mathematical way that medical expenses or lost earnings can be proven in an ordinary tort action. Mr. Justice Powell specifically says in *Gertz*, 418 U.S. at 350:

> "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury."

Under West Virginia law in an action to recover for an intentional tort, as opposed to a negligent tort, a plaintiff is entitled to have such elements as mental anguish, insult, indignity, and humiliation considered by the jury in arriving at an award for actual damages. *Addair* v. *Huffman*, W.Va. , 195 S.E.2d 739 (1973).

The job of determining such intangible and subjective damages as personal humiliation, mental anguish, and indignity has always been the exclusive province of the jury subject to the gentle rule that awards in these areas not be excessive. In light of the amount of jury awards for pain and suffering which are routinely sustained by appellate courts in tort actions involving physical injury, and considering the rank and station in life of the plaintiff at the time of publication, this Court finds that the award of $250,000 actual damages was not excessive.

III

The defendant in this action objected to venue in Fayette County, West Virginia, on the grounds that *W.Va Code*, 59-3-1(c) [1967] changed the law under which *Hanks* v.

Beckley Newspapers, 149 W.Va. 552, 142 S.E.2d 727 (1965), was decided. *Hanks* held that an action against a newspaper may be brought in any county in which the cause of action, or any part of the cause of action arose, although the defendant is not a resident of that county, if the defendant, or if more than one defendant, one or more of the defendants, is a corporation under *W.Va. Code*, 56-1-2 [1923]. The opinion indicated that a newspaper is "circulated" in any county in which editions of the paper are sold and accordingly a part of the cause of action can be considered to have originated in any county where the newspaper is circulated and the libel is published.

W.Va. Code, 59-3-1 [1967] is a statute concerning newspapers and legal advertisements. Although in subsection (c) the statute says: "Notwithstanding any other provision of this *Code* or law to the contrary a qualified newspaper shall for all purposes be considered to be published where it is first placed in circulation," this *Code* section does not define the word "circulated" in a manner inconsistent with the *Hanks* case. Subsection (c) refers to where a newspaper is published as opposed to where a libel is published. Although for purposes of legal advertisements a newspaper is to be considered as "published" only in the county in which it is first placed in circulation, thus assuring that local newspapers will receive adequate support in the form of legal advertisements, that section in no way changes the common law definition of where a libel is "published." Accordingly we reaffirm our holding in the *Hanks* case that proper venue in an action against a newspaper publishing corporation lies in any county in which the libel is published.

IV

The defendant asserts that this action in the Circuit Court of Fayette County was barred *ab initio* by a previous dismissal of an action grounded on the same set of facts and filed in the Circuit Court of Kanawha County on October 28, 1968, just three days after the publications in

question appeared in the *Daily Mail*. In that initial suit filed in Kanawha County, the defendants submitted a motion to dismiss on the grounds that plaintiff's complaint failed to state a claim upon which relief could be granted pursuant to Rule 12(b)(6) *W.Va. RCP*. The motion was granted by an order entered March 14, 1969, which stated:

> "This court is of the opinion to and does hereby sustain said motions to dismiss of the respective defendants, and, it is, accordingly ORDERED that said action be, and the same is hereby, dismissed for the reasons set forth in the letter memorandum of opinion of this court dated March 11, 1969, copy of which is hereby attached, and, it is further ORDERED that said letter memorandum of opinion dated March 11, 1969, be and the same is hereby made a part of the record, in this action, to all of which the plaintiff objects and excepts."

It is interesting to note that the letter memorandum of opinion accompanying this order also dismissed the *action* in Kanawha County. But the letter opinion is basically a critique of the *complaint* in all its allegations, one by one, and while the trial judge concluded that "the complaint completely fails to allege even the substance of any matter which might constitute a basis for this action," the opinion goes on to describe how a proper complaint for libel could be drafted indicating the alleged libelous material must set out *in hacc verba*. The trial judge did not state that there was no possible way for the plaintiff correctly to amend the complaint, nor did he state that the dismissal was with or without prejudice, nor did he expressly grant the right to amend. This Court is of the opinion that the trial judge in Kanawha County did not intend to dismiss the action, but rather intended to dismiss only the complaint. Therefore, while not necessary to the Court's decision, the Court believes that the peculiar facts of this case strengthen our holding that the Kanawha County action should not operate as *res judicata* to the subsequent action in Fayette County.

The plaintiff did not *sua sponte* seek leave to file an amended complaint, nor did he, by appeal or otherwise, seek to have the final order dismissing the action set aside or modified. Instead, on October 27, 1969, more than six months after the final order dismissing the Kanawha County action was entered, plaintiff filed the present suit in the Circuit Court of Fayette County alleging similar facts. Following denial of defendant's motion to dismiss for lack of venue in Fayette County, defendant moved for summary judgment setting forth the final Kanawha County judgment as a bar. The Fayette County court denied this motion and the defendant assigns the denial as error.

The issue presented is whether a 12(b)(6) dismissal for failure to state a claim is a final appealable judgment on the merits and, therefore, under the doctrine of *res judicata*, a bar to a subsequent action grounded on substantially the same facts.

West Virginia law has never squarely met this question, and when it has met it obliquely the decisions stand in direct conflict. On the one hand, there is a 1965 opinion of this Court in *U. S. Fidelity & Guaranty Co.* v. *Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965) which states:

> "If a summary judgment is entered under Rule 56 R.C.P. it is a dismissal with prejudice; whereas, a judgment sustaining a motion to dismiss under Rule 12(b) for the failure to state a claim upon which relief could be granted is not a dismissal with prejudice."

On the other hand a 1969 decision, *Barker* v. *The Traders Bank*, 152 W.Va. 774, 166 S.E.2d 331 (1969), provides:

> ". . . it should be observed that a judgment of dismissal of an action under Rule 12(b) or a final summary judgment under Rule 56, rendered by a trial court is not here reviewable upon certificate but can be reviewed by this Court only upon appropriate appellate process."

In addition, search for guidance on this subject in other jurisdictions is equally unavailing as there is a nation-wide split of authority concerning whether an involuntary dismissal under Rule 12(b)(6) constitutes a bar to a subsequent prosecution of a new action alleging similar facts. The majority view and national trend favors the conclusionary nature of a 12(b)(6) dismissal as a determination on the merits. This view is based on the policy of protecting defendants from irresponsible forum-shopping by plaintiffs and on the policy of providing a definite end to litigation without fear by the prevailing party that actions, once dismissed, will be brought again. The rationale of this view is supported by the liberal amendment provisions of the Federal Rules which have been adopted by many states, including West Virginia.

The majority rule rests upon the authority of Rule 41(b) which says in part:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

Consequently under the majority rule a dismissal pursuant to a Rule 12(b)(6) motion falls within the contemplation of the plain meaning of Rule 41(b).

Courts which follow the majority view hold that a final judgment can be rendered on the pleadings alone. *Olsen* v. *Muskegon Piston Ring Co.*, 117 F.2d 163 (6th Cir. 1941). For example, one court holding the majority view has stated that in cases where a motion to dismiss a complaint is sustained and the complaint is dismissed, and where the plaintiff does not desire to amend, he should announce his election to stand on his pleading, let a final order or judgment be entered dismissing the action, and then appeal from that order or judgment. *Crutcher* v. *Joyce*, 134 F.2d 809 (10th Cir. 1943). The rule of finality also applies when leave to amend the complaint is granted but not acted upon

as well as when leave is not granted. *Matthews* v. *Wolvin*, 266 F.2d 722 (5th Cir. 1959). In the case of *Fyfe* v. *Pan-Atlantic S.S. Corp.*, 114 F.2d 72 (2nd Cir. 1940), the Court capsulized the majority view in stating that "[u]nder modern principles, failure to amend upon dismissal of a complaint under circumstances where amendment was permissible should bar the institution of a second suit."

To the contrary, however, a significant, though shrinking, number of jurisdictions follow the minority view which permits a second suit despite defective pleading in the original action. The policy underlying this position argues that dismissal for failure to state claim never reaches the merits of a claim and, therefore, ought not to operate as *res judicata* because a litigant deserves to have his case decided on the merits.

For instance, in the case of *Rost* v. *Kroke*, 195 Minn. 219, 262 N.W. 450 (1935) judgment was entered and the complaint dismissed pursuant to an order sustaining a demurrer to the complaint for failure to state a cause of action. The complaint had alleged in the alternative facts constituting a good cause of action and facts which did not. The court held that the dismissal was not a bar to a subsequent suit in which the defective pleading was corrected by stating a good cause of action. Moreover, after a decision by a state court dismissing a complaint for failure to state a cause of action because it invoked the doctrine of *res ipsa loquitur* which was adjudged inapplicable, one federal court operating under the *Federal Rules* held that the dismissal was not *res judicata* as to plaintiff's right to maintain an action in federal court on the same cause of action. *Bruening* v. *El Dorado Refining Co.*, 53 F.Supp. 356 (W.D. Mo. 1943).

The minority view makes one concession to the majority view in that it recognizes that if, in a prior action, leave to amend is expressly granted and the privilege is specifically refused, then the prior action does become *res judi-*

cata. *Hacker* v. *Beck*, 325 Mass. 594, 91 N.E.2d 832 (1950). In the case at bar, however, leave to amend was not sought and was not granted.

Having pondered at length both majority and minority viewpoints, this Court is of the opinion that the majority view, which maintains that prior dismissal under Rule 12(b)(6) is a final judgment unless the court specifically dismisses without prejudice, is the better view and should be adpoted in this State; however, the Court further holds that it is only equitable to give our conclusion in this regard exclusively prospective application due to the extraordinary confusion in both this State and other jurisdictions with regard to the issue. The law of West Virginia was so unclear as to put the parties in the case at bar to playing a needless "game of forfeits," and furthermore, there was no conclusive guidance on the matter available from foreign jurisdictions, state or federal. In addition, the trial judge clearly intended to dismiss only the complaint and not the entire action.

This Court's policy with regard to procedural irregularities which needlessly interfere with a disposition on the merits was succinctly stated in the recent case of *Rosier* v. *Garron*, *W.Va.* , 199 S.E.2d 50 (1973), where the Court said:

> ". . . [T]he distinction between procedural rules and substantive rights is frequently illusory. However, to the extent possible, under modern concepts of jurisprudence, legal contests should be devoid of those sporting characteristics which gave law the quality of a game of forfeits or trial by ambush."

This case raises, once again, the age-old conflict between society's need for predictability accomplished through legal formalism versus society's need to do justice in individual cases. Formality and order are values essential to the stability of any legal system, yet, as was articulated in detail in *Rosier, supra*, man's fundamental sense of

justice constantly clashes with formalism when procedural impediments undesignedly lead to an unreasonable result. Results become logically insupportable when they are based upon a law which is unintelligible.

The Court holds, therefore, that the future law in this State with regard to dismissals under Rule 12(b) is that a judgment dismissing an action under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, and without reservation of any issue, shall be *presumed* to be on the merits, *unless* the contrary appears in the order, and the judgment shall have the same effect of *res judicata* as though rendered after trial in a subsequent action on the same claim. *1B Moore's Federal Practice*, (2nd Ed. 1974), § 0.409. We further hold that a judgment on the merits shall not require a determination of the controversy after a trial or hearing on controverted facts. It shall be sufficient that the record show that the parties might have had their controversies determined according to their respective rights if they had presented all their evidence and the court had applied the law, *Olsen* v. *Muskegon Piston Ring Co., supra.*

V.

The last of defendant's assignments with which this Court will deal are the alleged errors in the trial court's refusal to give defendant's instruction No. 14 and No. 7. Instruction 14 said:

> "The court instructs the jury that the publications complained of by plaintiff were published on October 24 and 25 of 1968 and that the question of libel, falsity and actual malice must be determined as of the time the various publications were published."

Obviously a newspaper under the First Amendment cannot be held to a standard of omniscience and can be judged with regard only to information which is available to the newspaper at the time of publication. Therefore, the Court

holds that it was error for the trial court to fail to give instruction No. 14 but that the error was harmless in light of all of the other instructions which were given in the case.

It is clear from a reading of plaintiff's instructions Nos. 1, 2a, 3, 7, and defendant's instructions Nos. 3 and 5 that the case was tried on the proper theory that a newspaper is to be judged concerning actual malice with regard only to information known by it at the time of publication.[10]

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[10] PLAINTIFF'S INSTRUCTION No. 1

The Court instructs the jury that if you find by a preponderance of the evidence that one or more of the publications identified as Plaintiff's Exhibit's Nos. 1 & 2 complained of constituted "libel", as that term is defined for you in these instructions, and if you further find by a preponderance of the evidence that the libelous publication or publications were false in some material particular; and if you further find by clear and convincing evidence that the libelous and false statements were published with actual malice, as defined in these instructions, then your verdict may be for the plaintiff, James M. Sprouse, and against the Charleston Mail Association.

PLAINTIFF'S INSTRUCTION No. 2a

The Court instructs the jury that libel in a case brought by a nominee for public office may be defined as a false writing published by the publisher with knowledge of its falsity, or false publication published with reckless disregard of its falsity and which tends to injure the reputation of the nominee, to throw contumely or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule, or contempt.

PLAINTIFF'S INSTRUCTION No. 3

The Court instructs the jury that the term "actual malice" means that the defendant published false and defamatory statements with knowledge that they were false or with a reckless disregard of whether they were true or false.

PLAINTIFF'S INSTRUCTION No. 7

The Court instructs the jury that even though failure to investigate, on the one hand, and mere ill will, bias spite or prejudice on the other, standing alone, are insufficient to establish either a

In general, where it appears to this Court that the effect of an improperly refused instruction is merely cumulative,

knowledge of the falsity of, or a reckless disregard of the truth or falsity of the materials used; however, such evidence, if any, of motive, intent, may be considered for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. Goldwater v. Ginzburg, 414 F.2d 324, 342.

DEFENDANT'S INSTRUCTION No. 3

The Court further instructs the jury that all of the news stories and editorials published by the defendant, and complained of by the plaintiff, were constitutionally protected and require a verdict for defendant, unless:

First, one or more of the publications complained of constituted "libel" as that term is defined for you in these instructions;

Second, the libelous publication or publications were false in some material particular; and

Third, the libelous and false statements were published with "actual malice" as defined in these instructions;

The burden is upon the plaintiff to prove the first two of these essential elements by a "preponderance of the evidence" as that phrase is defined in these instructions;

The burden of proof to be borne by plaintiff with respect to the third essential element—actual malice—is more strict. The plaintiff has the burden of proving actual malice by "clear and convincing evidence".

The Court instructs the jury that by clear and convincing evidence is meant more than a mere preponderance of evidence. Clear and convincing evidence is that evidence which is so clear, explicit, and unequivical [sic] as to leave no substantial doubt and which is sufficiently strong to command the unhesitating assent of every reasonable mind.

If you find that plaintiff has failed to establish any of these three essential elements by the standard explained, it is your duty to return a verdict for defendant.

DEFENDANT'S INSTRUCTION No. 5

The Court instructs the jury that the term "actual malice," which must be established by clear and convincing evidence to warrant a verdict for plaintiff, means that defendant published false and defamatory statements with knowledge that they were false

and that the theory of the case enunciated in the refused instruction has been adequately covered by other instructions, and where it further conclusively appears that the outcome of the case would not have been affected by the giving of the refused instruction, this Court will not reverse for failure to give that instruction alone. *Jackson* v. *Cockill*, 149 W.Va. 78, 138 S.E.2d 710 (1964); *Morgan* v. *Price*, 151 W.Va. 158, 150 S.E.2d 897 (1966). The defendant is entitled to a fair trial; it is not entitled to a perfect trial because such a thing does not exist.

The defendant further argues that it was error to refuse defendant's instruction No. 7 which said:

> "The Court instructs the jury that in considering the news stories complained of which quote or attribute statements to Arch A. Moore, Jr., the Republican nominee for Governor, there was no legal duty on the part of defendant to subject Moore's statements to any test of truth; and that accordingly, since plaintiff has presented no evidence from which you could find that Moore's statements were not accurately and fairly reported, you may not return a verdict for plaintiff against defendant based on statements of Moore published by defendant, even though you may believe from the evidence that Moore's statements were libelous and false and that he was aware of the falsity or acted with a reckless disregard of whether they were true or false.

The Court holds that defendant's instruction No. 7 is not an accurate statement of the law as applied to the facts of this case. Although in general a newspaper is not liable for publishing in good faith statements of political

or with a reckless disregard of whether they were true or false. Reckless disregard for the truth cannot be equated with negligence or what a reasonable man would have said under the circumstances.

Reckless disregard for truth or falsity implies a high degree of awareness of probable falsity. There must be clear and convincing evidence permitting the conclusion that the defendant in fact entertained serious doubts as to the truth of his false and defamatory publication.

candidates during an election campaign, the evidence in this case demonstrates that the statements of Arch A. Moore, Jr. were closely coordinated with the story generated by the defendant as part of an overall plan or scheme, the purpose of which was to discredit plaintiff. Although the defendant would not have been liable for publication of the Moore statement if defendant were unaware at the time of publication of the falsity of the statement, the evidence in this case reasonably implies that at the time of publication the *Daily Mail* knew that the accusations made by Moore were false. Accordingly, in order for defendant's instruction No. 7 to have been given, it would have been necessary for defendant to qualify it by admitting that the defendant would be liable for the Moore statements if the jury concluded that defendant published them with actual knowledge of their falsity or with willful and reckless disregard for their truth. See, generally: *Greenbelt Cooperative Publishing Association, Inc.* v. *Bresler*, 398 U.S. 6 (1970). As the defendant did not offer to amend the instruction to conform to the law, the instruction was properly refused.

Therefore, for the reasons set forth in this opinion, the judgment of the Circuit Court of Fayette County is reversed in part and affirmed in part, and the case is remanded to the Circuit Court with instructions to strike as a matter of Federal Constitutional law the jury award of punitive damages and to enter judgment on the jury verdict for $250,000 actual damages plus interest from date of judgment and costs.

Mr. Justice Haden and Mr. Justice Sprouse, deeming themselves disqualified, did not participate in the consideration or decision of this case.

Mr. Justice Haden and Mr. Justice Sprouse, deeming themselves disqualified, did not participate in the consideration or decision of this case.

Reversed in part, affirmed in part, remanded with instructions.

Appendix to Opinion of Neely, J.

Charleston Daily Mail
Charleston, West Virginia
Thursday Evening October 24, 1968

[Directly beneath the newspaper title and the date line appeared the following headline in normal size headline type extending across the entire eight columns of the front page:]

SENECA ROCKS TOURIST PROJECT PROPERTY ENRICHING CANDIDATE SPROUSE

[Directly beneath this headline and also extending across the entire eight columns of print appeared a picture of the land allegedly purchased by Sprouse and his corporation. The caption beneath the photograph read:]

> A New York corporation headed by Democratic gubernatorial candidate James M. Sprouse owns the land above, which is adjacent to a national recreation area in eastern West Virginia where the federal government has plans to develop a $30 million tourist attraction. The corporation already has made a handsome profit on its original investment, and retained the choice land in Pendleton County, like that shown in this photograph. The corporation was formed a month before the U.S. Forest Service completed its plans for the recreation area, and before the plan was approved by Congress. Much of the corporation's profits, to date, eventually will come from the U.S. Treasury.—Daily Mail Photo by Chester Hawes.

[Beneath the photograph and caption appeared the following headline in oversize type extending across five columns:]

PENDLETON REALTY BONANZA
BY JIM SPROUSE DISCLOSED

[The following sub-headline appeared next in normal size headline type printed across the two columns in which appeared the article:]

CLEANUP OF NEARLY
$500,000 IN VIEW

By Bob Mellace
Daily Mail Political Editor

A corporation formed in New York and headed by Democratic gubernatorial candidate James M. Sprouse stands to make a very handsome profit dealing in property adjacent to a $30 million federal recreation and tourism project in eastern West Virginia, the Daily Mail has learned.

The corporation already has made a profit of $48,176—most of which will come eventually from the U.S. Treasury—on an original investment of $134,620. And the valuation of its remaining holdings runs as high as $400,000, according to information obtained by this newspaper.

There is evidence the firm has violated state law by buying and selling property before it was qualified, as a foreign corporation, to do business in West Virginia. There is additional evidence it has never done any business in New York where it was chartered, and where the law permits incorporation by an agent without identifying the incorporators, which is forbidden by West Virginia law.

The corporation is 'Selmet Properties, Inc.,' and the only persons involved in it, from the records and information given the Daily Mail by the U.S. Forest Service, are Sprouse, Elkins real estate dealer and Democratic political figure, Robert Hedrick, Pendleton County motel operator and Sprouse supporter Wilson Smith, and a New York lawyer.

All of the property involved is in Pendleton County. It is adjacent to or very near two of the state's greatest natural attractions—Spruce Knob and Seneca Rocks.

$30 Million Outlay

E. M. Oliver, supervisor of the Forest Service in Elkins, said the federal government has plans to develop the entire area for recreation and tourism at a total estimated cost of $30 million, and work on it already is under way.

The development plan was completed in March, 1965 for presentation to Congress, after months of work on it by the Forest Service.

One month earlier, on Feb. 25, 1965, Selmet Properties was incorporated in New York by Jerome L. Grometstein, a New York Attorney who certified the office of the corporation was to be located in the city of New York.

A bill authorizing the project was introduced in Congress in April and passed in September, 1965.

On March 12, 1966, Selmet bought approximately 2,900 acres from Henry Regnery and his (See SPROUSE, pg. 11, Col. 1)

[At the top of Page 11 above the continuation of the story the following headline appeared in normal size headline type and extending across six columns:]

Sprouse Owns Choice Land Beside $30 Million U.S. Resort

[Beneath the headline and also covering six columns appeared a reproduction of a map showing the general area where the land was located, beneath which appeared the following caption:]

This is a map of the area where the federal government has plans to spend $30 million developing one of the major tourist attractions of the Eastern United States. A New York corporation headed by Democratic gubernatorial nominee James M. Sprouse owns some choice land in the area as shown by the heavy arrow between the community of Riverton and the road leading to Spruce Knob, the highest point in West Virginia. The knob and Seneca Rocks, a few miles from the corporation holdings, will be the chief attractions, but others are shown in this map prepared by the U.S. Forest Service, which will operate the recreation area in the Monongahela National Forest.

[Beneath the map and caption appeared the following two-column headline in oversize type:]

SPROUSE PENDLETON
BONANZA DISCLOSED

[Thereafter appeared the continuation of the story from the front page as follows:]

wife for $134,620 and paid cash for it according to the deed on record in the Pendleton County courthouse.

Between May 6 and June 7, 1966, Selmet conveyed seven parcels to various individuals for $67,932.75, with all of the deeds signed by Sprouse as president of the corporation. Much of the property was sold for $1,000 an acre in the bottomland of the North Fork of the South Branch of the Potomac River and U.S. Route 33, a main traffic artery between the two great natural attractions.

More than two months after it started selling property, Selmet registered in the office of the West Virginia secretary of state, required of foreign corporations before they can own property or do business in West Virginia according to the law.

Sprouse signed as president and Hedrick as secretary-treasurer, and stated Selmet owned 1,600 acres of land worth $75,000 as of Aug. 25, 1966.

OFFICE IN CHARLESTON

Whereas the New York charter application showed the principal office of the firm as being in New York City, the West Virginia document shows the principal office as 700 Terminal Building, Charleston, where Sprouse has his law firm.

Three months after qualifying to do business here, Selmet sold a tract for $28,000 in a deed dated Nov. 26 and signed by Sprouse as president of Selmet.

That brought Selmet's take to $95,932 and was the last deed signed by Sprouse as president. All other deeds from

that day to the present have been signed by Hedrick as president.

In January, 1967, Olliver said the Forest Service was approached by Smith, offering to sell a tract of 1,385 acres, and the service recommended in May that it be purchased.

Because the Forest Service did not have the money for the purchase at that time, Olliver said his office approached Nature Conservancy, Inc., of Washington to buy the tract and hold it for the service. Nature Conservancy is a non-profit corporation of dedicated conservationists who buy land for public agencies and hold it until the agency involved is prepared to buy it.

Selmet sold the acreage to Nature Conservancy on Oct. 2, 1968 for $81,364. That made Selmet's total gross income $182,796.75 more than it paid the Regnerys for its entire holdings.

Olliver said the only person he ever talked to about the deal was Smith, that he never knew who owned Selmet, and that he couldn't find out because at the time he inquired the firm was not incorporated in West Virginia.

There is no precise way to measure how much land Selmet has left out of the original Regnery tract because of the inaccuracy of deeds in the mountainous territory.

However, by deducting all of the land sold by Selmet, and using the Pendleton County land books as a guide, you come up with a total remaining of 404 acres.

Much of this appears to be in the bottomland and includes very flat property on the highway that will be attractive to developers of motels, service stations, etc., when the Forest Service completes the great tourist complex.

The Selmet property lies a few miles south of Mouth of Seneca, where the great rocks come in full view of the tourists. It is between Riverton and Secondary 13, a hard-

base road that now leads up to Spruce Knob, the highest point in West Virginia, 4,862 feet.

All of the area lies within the Monongahela National Forest where a 100,000-acre tract has been designated as the Spruce Knob-Seneca Rocks National Recreation Ara [sic].

Charleston Daily Mail
Charleston, West Virginia
Friday Evening October 25, 1968

[At the top of the front page of this day's edition appeared the following headline in oversize headline type across columns one through four:]

MOORE ASKS FEDERAL
PROBE INTO SPROUSE'S
PENDLETON LAND GRAB

[Directly beneath the following sub-headline which was printed in normal size headline type covering two columns appeared this news story:]

'Dummy Firm' Seen
Proving Corruption

By Bob Mellace
Daily Mail Political Editor

Congressman Arch A. Moore Jr. today asked for a full congressional investigation of the land dealings near a $30 million federal recreation project by a New York corporation headed by his Democratic opponent for governor, James M. Sprouse.

["]From what I have read in the newspaper and from information that has since come to me privately, it would appear that this land grab smacks of the same old Statehouse corruption,["] Moore said. [Note by Petitioner: Quotation marks erroneously omitted by court below.]

Yesterday's Daily Mail carried a story about Selmet Properties, Inc., which already has made a handsome profit

in Pendleton County near the new Spruce Knob-Seneca Rocks National Recreation Area, and stands to make much more.

The corporation, according to New York state records, was formed in February, 1965 a month before plans for the federal project were announced by the U.S. Forest Service.

Moore said:

"Here we have a dummy corporation, set up in the dark of night in the state [sic] of New York, which claims its assets consist solely of real estate in the State of West Virginia. This seems more than vaguely reminiscent of the Florida corporation scandals of a few months ago.

"I see no reason for the formation of such a corporation in the State of New York, unless you wish to conceal certain facts of the internal workings of the corporation, or to avoid disclosures as to the ownership of the corporation . . . It is obvious there were other compelling reasons for these West Virginians to go outside the state for the formation of their company. I would like to know what they wished to hide. I think also that these questions should be answered:

"1. Who were the members of the corporation in addition to James M. Sprouse, Robert Hedrick and Wilson Smith?

"2. Did they have prior knowledge of the Forest Service recommendation that this area of land would be utilized as a portion of the federal recreation complex planned there?

"3. Where did the money for the purchase of this land come from?

"4. Were any individuals in (Se [sic] Sprouse's pg. 6, Col. 1)

[The story is continued on Page 6 under the one-word, one-column headline "Sprouse's:]

(Continued from Page One)

the federal government involved?

"5. Who was responsible for changing the boundaries of the recreation complex to include land owned by this corporation?

"6. Have any members of this corporation been involved in similar land sales to the federal government or its agents in this same area?

"7. Why was one tract of land, not contigous and not needed for this recreational [sic] facility, included in the sale?

"I believe that these questions should be answered in full. To this end, this day I am asking for a full investigation of this entire matter by the appropriate committee of the House of Representatives."

Sprouse has made no comment on the Daily Mail story of Thursday but called a news conference for 3 p.m. today, reportedly to discuss the story.

Hedrick was identified as an Elkins real estate dealer, active in Democratic party affairs, and a director of the U.S. Farmers Home Administration. Smith is a Pendleton County motel operator, also a Democrat and active in Sprouse's campaign.

Selmet Properties, according to the Daily Mail's information, did not sell land directly to the federal government.

Director E. M. Olliver of the Forest Service explained that, in cases where the service wants land and does not have money at hand to purchase it, there is a non-profit

corporation of conservationists, Nature Conservancy, Inc., of Washington, D.C., that buys the land and holds it.

At the service's direction, Nature Conservancy bought a 1,385-acre tract from Selmet for $81,364. Olliver said the service now is in process of buying it from Nature Conservancy, at cost plus expenses.

The Nature Conservancy sale put Selmet's gross profits up to $48,176 on its original cash investment of $134,620, according to deeds on record in the Pendleton County courthouse. In addition, the corporation has much valuable land left on the main highway through the big recreation complex.

[A second article appeared on Page 1 of the Daily Mail, placed directly adjacent to the above article. At the top of the page spanning columns five through eight appeared the following headline in normal size headline type:]

Where Governor Candidate 'Cleans Up'

[Below the headline appeared a photograph of the Seneca Rocks area which also spanned four columns. Beneath the photograph appeared the following caption:]

Seneca Rocks, above, are one of West Virginia's most scenic attractions but the U.S. government says they are worth only $7,900, according to D. C. Harper, in picture below, who says the rocks have been in his family more than 200 years. The government wants them for a new recreation area in Pendelton County and Harper says he will fight the condemnation action at the price offered. Meanwhile, down the road from the rocks, the government will pay $81,364 for property owned by a corporation headed by Democratic gubernatorial candidate James M. Sprouse, without a condemnation fight, and will take more property than it actually needs.—Daily Mail Photos by Chester Hawes.

[Beneath the above quoted caption appeared the following headline spanning four columns:]

FORTUNE TO JIM SPROUSE
BUT PITTANCE FOR SENECA

Landmark's Owners Plan
Court Fight Against Deal

[Under the headline and beside the story was a photograph of D. C. Harper extending across two columns under which was printed the caption:]

D. C. Harper . . . . Will Fight Rocks Project

[Beside the picture of Harper and beneath the headline appeared the following story:]

By BOB MELLACE
Daily Mail Political Editor

The owners of Seneca Rocks, one of the greatest natural attractions in the Eastern United States, say the federal government has offered them $7,900 for their property. And they will fight it in a condemnation court.

But the same federal government will pay, indirectly, more than $81,364 to a New York corporation headed by Democratic gubernatorial nominee James M. Sprouse for what is mostly cutover hillside land just a short distance from the rocks.

And the U.S. Forest Service says it had to make concessions to the corporation to get the land it wants for a new road to Spruce Knob recreation area. It did not consider it necessary to condemn this land.

The service is developing a new recreation complex on 100,000 acres of the Monongahela National Forest and Seneca Rocks and Spruce Knob are the key attractions. It is estimated to cost $30 million.

Sprouse called a press conference at 3 p.m. today, reportedly to comment on yesterday's Daily Mail story about the New York corporation.

D. C. Harper lives at the Mouth of Seneca and says the rocks have been in his family more than 200 years. They are on a 73-acre tract. But, says Harper, that tract includes flat land fronting 1,100 feet on the main highway, U.S. 33—State Route 28, and land on that highway in the vicinity of the new development is selling for $1,000 an acre and more.

IN NAMES OF HEIRS

The rocks are now in the names of his two children and their children, according to Harper, who says they will fight the condemnation proceedings.

He adds that appraisals of the rocks have run from $9,000 to $40,000, and that he once refused to give an option on them for $150,000.

They are a great tourist attraction and a magnet for college students from all over the east who come to Mouth of Seneca every holiday to climb the rocks. The benefits to the owners are incidental to the operation of a general store opposite the rocks.

South of the rocks on U.S. 33 a few miles is the 2,900-acre tract purchased by Selmet Properties, Inc., for $134,620 in March 1966. In August of the same year, Sprouse signed as president when the corporation qualified to do business in West Virginia.

Selmet was chartered in New York in February, 1965, one month before the Forest Service disclosed its plans for new recreation area. According to the records, it has done no business in New York, only in Pendleton County, West Virginia.

As of this month, Selmet had a gross profit of $48,176 from sales of some parcels from the original tract, but re-

tains much valuable bottomland fronting on the highway and variously esti- (See LANDMARK, Pg. 6, Col. 4)

[On Page 6 appeared the following headline above the continuation of the story:]

continued

Landmark Owners
Offered 'Pittance'

mated at 400 acres worth $1,000 an acre.

A deed recorded May 7, 1966, and signed by Sprouse as President of Selment [sic] shows William Painter and others paid $12,000 to the corporation for 12 acres on the uphill side of the highway. It is an ideal location for a store and service station because it is at the intersection of the main highway and a rockbase road running up the mountain to Spruce Knob.

But, when the recreation complex is completed, that road won't be the main entrance to the new recreation area. A new road will be constructed on what once was Selmet property, and which will be flanked by Selmet property when it is in service.

OLD ROUTE UNSUITABLE

The new road is what brought Selmet into the picture, according to E. M. Olliver, supervisor of the Forest Service at Elkins.

He told the Daily Mail that an engineering survey showed the present road to Spruce Knob, where Painter bought his property from Selmet, would not be suitable for traffic when the new complex is completed.

If it is any consolation to Painter, Olliver also said that improvements of the old road to the standards sought by the service would have required the taking of his property anyway.

However, Olliver continued, the survey showed the best location of a road to the Knob is a short distance north of the Painter property, on Blizzard Run. The Blizzard Run property provides the necessary width, alignment and grade needed for the new road, Olliver said, and added, "that's when we went to Selmet."

He did not know who Selmet was, he said, because the corporation was not registered at the secretary of state's office in Charleston. But Wilson Smith, a motel operator and Sprouse supporter in the current political campaign, came to the Forest Service in January, 1967, and offered the 1,385 acre tract.

The property, according to Olliver, includes the site of the new road, on the western side of the highway, some bottomland, and another tract on the eastern side of the highway, above the bottomland and far from the forest boundaries.

The Forest Service did not want all of that land, Olliver said, but Selmet refused to sell what the service wanted unless it took it all.

Why didn't the Forest Service condemn what it wanted, without taking the land on the opposite side of the highway?

"We didn't have to condemn," Olliver replied "because it was a case of willing seller and willing buyer."

But Olliver and his property manager also disclosed that the Selmet property it did want, for the road, was not in the forest boundaries, which had to be extended to cover that property before it could be purchased.

The property on the other side of the highway, which it also had to buy, is not in the forest boundary. Its purchase was justified by Olliver, who said it qualifies for government purchase because it is suitable for national forest purposes.

The U.S. Forest Service did not have the available funds to buy the Selmet property, Olliver said, so it turned to Nature Conservancy, Inc., of Washington, D.C. This is a non-profit organization of conservationists who buy land wanted by the federal government for parks and other purposes and hold it until the government agency has the money to buy it back.

The Forest Service is now in the process of getting the land from Nature Conservancy, Olliver said, and will pay what the Nature Conservancy paid to Selmet, plus any expenses Nature Conservancy incurred in the purchase.

Selmet conveyed the 1,385 acres to Nature Conservancy Oct. 7, 1968, for $81,364. Robert Hedrick of Elkins signed as president of Selmet, with Smith as vice president, according to the deed on record at the courthouse in Franklin.

APPENDIX B

Final Order of the West Virginia Supreme Court Entered February 4, 1975

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 4th day of February, 1975, the following order was made and entered, to-wit:

JAMES M. SPROUSE, *Plaintiff Below, Appellee*

13463 v.

CLAY COMMUNICATION, INC., a corporation, *Defendant Below, Appellant*

Upon an appeal from and supersedeas to a judgment of the Circuit Court of Fayette County rendered on the 21st day of December, 1973, overruling motion to set aside the verdict of the jury and the judgment entered on the 9th day of August, 1973.

The Court having maturely considered the transcript of the record herein, the argument and briefs of counsel thereon, and the briefs Amicus Curiae of American Newspaper Publishers Association, by Gilbert S. Bachmann, and Arthur B. Hanson and W. Frank Stickle, Jr., its attorneys; West Virginia Trial Lawyers, by Stanley E. Preiser and Robert T. Goldenberg, its attorneys, is of opinion for reasons stated in writing and filed with the record that there is error in said judgment, but not such as to require reversal of the entire judgment. It is therefore considered and ordered that the judgment of the Circuit Court of Fayette County rendered on the 21st day of December, 1973, overruling motion to set aside the verdict of the jury and the judgment entered on the 9th day of August, 1973, is affirmed insofar as it refused to set aside the jury verdict in favor of the plaintiff in the amount of $250,000.00, general damages, plus 6% interest and costs, but insofar as it refused to set aside

the jury verdict for the additional amount of $500,000.00, punitive damages, the same is hereby reversed, set aside and annulled. And this action is remanded to the Circuit Court of Fayette County with directions to enter judgment upon the jury verdict for $250,000.00 aforesaid, plus interest from date of judgment, and costs, according to the principles stated in the written opinion aforesaid and further according to law; all of which is ordered to be certified to the Circuit Court of Fayette County.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice Neely, was concurred in by Justices Berry and Caplan. Justices Haden and Sprouse, deeming themselves disqualified, did not participate in the consideration or decision of this case.

A True Copy

/s/ George W. Singleton
Clerk Supreme Court
of Appeals

APPENDIX C

Order of the Circuit Court of Fayette County, West Virginia Filed December 21, 1973, Together with a Memorandum Opinion of Said Court Dated December 7, 1973

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

Civil Action No. C-4885

James M. Sprouse, *Plaintiff*,

v.

Clay Communications, Inc., a corporation, *Defendant*.

Order

This day came the parties by counsel relative to the motion heretofore made by the defendant to set aside the verdict of the jury and the judgment entered thereon, and to have judgment entered for the defendant, or in the alternative to set aside the verdict of the jury and the judgment entered thereon, and to award the defendant a new trial, for the reasons assigned in said motion.

The Court, having maturely considered the briefs and argument of counsel contained therein, is of the opinion to deny and overrule said motion.

It is therefore Ordered that said motion be overruled in accordance with the memorandum of opinion dated December 7, 1973, which is hereby Ordered filed as part of the record herein, to all of which action the defendant objects and excepts.

Whereupon, the Court did hear the motion of the defendant to stay the issuance of any execution upon the judgment and any other proceedings for its enforcement for a reasonable time as would enable the defendant to present to the West Virginia Supreme Court of Appeals a petition for appeal, writ of error or supersedeas from the

judgment; and it is therefore accordingly ORDERED that execution upon such judgment and any other proceedings for its enforcement be stayed for a period of ninety (90) days from the entry of this order and thereafter as the court may determine upon motion and notice, conditioned upon defendant's delivery to the clerk of this Court a bond in the amount of Ten thousand Dollars ($10,000.00) for the payment of all damages as any person may sustain by reason of such suspension in case supersedeas to such judgment not be allowed upon appeal.

ENTER:

/s/ CHARLES L. GARVIN JR.
Charles L. Garvin, J—r.
Judge

APPROVED AS TO FORM:

/s/ RUDOLPH L. DITRAPANO
Counsel for Plaintiff

/s/ F. PAUL CHAMBERS
Counsel for Defendant

PRESENTED BY:
/s/ W. ROBERT ABBOTT

TWELFTH JUDICIAL CIRCUIT OF WEST VIRGINIA
FAYETTE COUNTY
CHARLES L. GARVIN, JR., JUDGE
FAYETTEVILLE, WEST VIRGINIA

December 7, 1973

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Fayetteville, West Virginia

Re: James M. Sprouse
Vs. C-4085
Clay Communications, Inc.
A West Virginia Corporation

Gentlemen:

The defendant has filed its motion to set aside the verdict of the jury and the judgment entered thereon, and to have judgment entered for the defendant, or in the alternative to set aside the verdict of the jury and the judgment entered thereon and to award the defendant a new trial.

The Court is of the opinion that such motion should be overruled.

The record in this case speaks for itself, and references should be made to it for correction of the very few instances in which the arguments of counsel as set forth in their various briefs are somewhat imprecise.

I believe that the points are saved in each instance upon any adverse ruling by the Court.

Counsel for the defendant furnished the Court with what I consider to be a very good and thorough trial brief. I studied it throughout and referred to it several times during the trial and appreciate it. I believe the rulings of the Court reflect some of the matters of law set forth in this brief and as interpreted by defense counsel. Excellent briefs were filed by the lawyers representing the parties during and after the arguments on the motion the Court is now asked to determine. The points seem to be many, and are so well briefed on each side that I have difficulty believing that the Court's discussion here of these many points would be particularly beneficial to anyone. In many instances the Court's comments here would merely belabor what is already well set out in the briefs of counsel. In fact the Court has written opinion letters on some of the points prior to trial.

Perhaps I should comment upon the Court's ruling that the defendant's financial standing could be introduced into evidence and considered by the jury under plaintiff's instruction 10a in the jury's consideration of damages. You

have already called my attention to the recent case of Spencer vs. Steinbrecher, 152 W. Va. 490. The principles set out in this recent case are perhaps even more fully set out in the earlier case, Pendleton vs. Railway Co., 32 W. Va. 270. In addition to the principles set forth in the Spencer case the Pendleton case holds that "it is competent to consider the station of the parties, and particularly the financial . . . standing of the defendant in order that it may be determined what will be adequate and sufficient punishment, etc."

The Court did refuse certain of the defendant's instructions, and without referring to each one separately, it should be noted that some of these instructions were, in the opinion of the Court, adequately covered by other instructions which were given, and the record will show in which instances this ruling is applicable.

I should mention, however, with respect to defendant's Instruction No. 15 that this matter was adequately and fully covered by the Court when it inquired of the members of the panel upon their voir dire. Counsel was permitted to argue the content of the instruction before the jury. An instruction on the point would, in my opinion, detract from the importance of the answers the panel members gave under oath.

A careful reading of all of the instructions indicates to me that this jury was adequately and properly instructed upon the law applicable to this action of libel.

I feel called upon to comment upon defendant's assigned point of error 11. Counsel for the defendant stated that the Court erred in permitting Justice Sprouse to testify that former Governor Barron supported the republican candidate Arch A. Moore, Jr. in the 1968 gubernatorial election.

It should be pointed out that the defendant's attorney, Mr. Chambers, asked the line of questions which in the judgment of the Court opened the door. On page 313 of the record Mr. Chambers asked the following question:

Q. "Did you become a candidate for Governor of West Virginia with a background of being first during the Barron years—the years of former Governor Barron's governorship, President of the Young Democrats of West Virginia; then being during the administration of Governor Hulett C. Smith the Democratic State Chairman, a job which you continued to hold until after the Primary of 1968 ,in which you were nominated for Governor? When with that background of political leadership in your Party during a span of time extending over eight years, would you not normally expect to be identified with what is generally called the "Statehouse"?"

On page 314 Mr. Chambers asked Justice Sprouse the following question:

"Q. You were publicly endorsed for election by former Governor Barron during the campaign, were you not?"

Again on page 314 the following question was asked:

"Q. Did you repudiate that endorsement?"

In Chambers the Court asked Justice Sprouse certain questions which appear in the record on page 392.

It is the Court's reasoning that the answers given by Justice Sprouse to Mr. Chambers' questions and his answers given to the questions of the Court propounded to him upon the record out of the presence of the jury indicated that his answers were his conclusions based upon what he had read, specifically including the letter to the Charleston Gazette by the former Governor Cecil Underwood. It would seem considerably unfair to permit him to be questioned upon his state of mind and his conclusions without permitting his own counsel to question him upon what produced the state of mind and those conclusions. You will note that as soon as I remembered that it was Mr. Chambers in fact who had opened this door, I allowed it to come in.

Out of the order of the assignment of grounds of error I should like to mention the assigned point of error no. 3.

Before the opening statements of counsel were made the court ruled upon the objection that was made by defendant to the use of the enlarged placards of the Daily Mail papers in question. Defendant had distributed among each of the jurors the copies of the particular newspapers in question in their actual size. The use of the placards seemed to me at the time to be a blessing. It seemed to me that it would save counsel for both sides a great deal of time in the questioning of various witnesses to be able to point at one of those placards a few feet away from the jury and promptly and immediately draw their attention to the part, the headlines, the sentences, or the paragraph to be covered by the question. Otherwise almost every question would have taken a tremendous amount of time to specifically draw the attention of each juror to a particular place in the newspaper to be involved in the question to be asked. There would be great rustling of papers and numerous delays. It is also a fact, as is pointed out by counsel for the plaintiff, that if the jurors had these newspaper articles in their hands held up in front of their faces to read, then they would see the articles with exactly the same degree of clarity in which they viewed the enlarged placards several feet away; the enlarged placards blocking a lot less of their vision. And as I said before, counsel could quickly direct the entire jury's attention to the particular word, headline, sentence, or paragraph to be covered by the question.

In my view the placards neither added to nor detracted from in any way the headlines and words which appeared in the articles. I noticed many times counsel for the defendant referred and pointed to the placards instead of using the copies given to the members of the jury.

In rereading the opening statement of plaintiff's counsel I bore in mind defendant's assigned point of error no. 4. The record shows that the Court sustained the only objection made by defense counsel and asked plaintiff's lawyer to confine his remarks to an opening statement.

This was the only objection made. Then following the opening statement of counsel for the defendant, and after the noon recess, but before the first witness was called Mr. Kelly moved the Court to withdraw a juror and declare a mistrial. My opinion is that counsel should have objected each time to enable the Court to rule upon the specific matters which defense counsel found objectionable. By failing to do so I believe that counsel waived any objections they might have had.

At any rate I do not find anything in the opening statement of Mr. DiTrapano which could be classified as being so inherently prejudicial as to require the Court now to set aside a verdict and grant the defendant a new trial. If counsel for the defendant actually thought that this opening statement was so prejudicial, then they could have stopped Mr. DiTrapano right in his tracks by simply objecting.

With respect to the point of error assigned as no. 15 see the case of Pendleton v. Railway Company, 82 W. Va., 270, in syllabus 3, the second line:

"* * *, it is competent to consider the station of the parties, * * * etc."

Perhaps I should add at this point that it appears to me that counsel for the defendant in the brief filed seeks to take advantage of grounds which were not assigned as grounds of objection at the time plaintiff's instructions were offered. It is basic that grounds of objection must be assigned before the Court gives the instruction in order to save the point. All of us improve our instructions greatly with hind sight.

On page 12 of defendant's note of argument in support of its motion appears the following paragraph:

"2. It invites the jury to return a damage award for the loss of the election, which has no basis in the pleading and the evidence."

I have read and reread the record of this case and do not find that Mr. Chambers or any other attorney for the defendant assigned this as a ground of objection before the Court marked the instruction given and read it to the jury.

With respect to the assigned point of error 17, the matters which counsel attempted to raise by "Special Interrogatory A" were completely and adequately covered by the instruction which the Court had already read to the jury, and which counsel had every right to argue and did argue to the jury.

With respect to the assigned point of error no. 19, here is an anomaly. 'Tis said that a newspaper may in keeping with the background of a profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide-open, and that in its articles it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials, may cry foul when in a closing argument an attorney for the plaintiff in a libel action gives uninhibited, robust, wide-open, vehement, caustic, and unpleasantly sharp attacks on the newspaper. The jurys, having the benefit of Courts' instructions, are nevertheless said to be prejudiced by such closing arguments.

Before the jury the words of counsel are said to be inflammatory, to stir the embers of partisan passion, so as to render the jurors unfit to decide the case. But the newspapers in the interest of freedom of the press should not have to respond for damaging a victim unless there was knowledge of the falsity, or a reckless disregard for whether the printed matter was false.

As a matter of fact I thought all of counsel representing both parties to this action did an excellent job of arguing to the jury. In rereading the argument I don't find anything in the arguments which would inflame the minds of the jurors. But again, I must call attention to the record

as it was made up during the closing arguments. The record shows exactly when and how often there were objections.

With respect to the jury's verdict of $250,000.00 compensatory damages I would be very hesitant to say that this verdict is excessive. This is peculiarly an issue for jury determination and not for the judge.

Beyond any juestion this is a very large verdict, and perhaps larger than this judge, or for that matter any of the Supreme Court Judges may have rendered for the plaintiff in the event they first found the plaintff entitled to recover.

It is proper to take into account, and for the jury to consider, the station in life of the parties themselves, as well as the financial standing of the defendant. The Court instructed the jury that they could and should do this.

It occurs to me that a man who can seriously ask the public to elect him to the Governor's office would certainly not sell his good name for $250,000.00 or even $750,000.00. During the closing argument of counsel for the plaintiff, I wondered if he would quote Shakespeare, and he did. I will not attempt to quote it verbatim but in substance it is something like this:

He who steals my purse steals trash, but he who pilfers my good name profits not himself, but leaves me indeed poor.

With respect to the punitive damages, I trust that the jury was properly instructed on this point. But assuming that they were, the jury found that the defendant had libeled the plaintiff, including within their finding the necessary ingredient of actual malice. Otherwise under the instructions of the Court they could not have returned a verdict for the plaintiff. Finding malice to exist, the jury determined that the $250,000.00 compensatory award was not sufficient to punish the defendant and to deter others.

Here again this was an issue for the jury. The jury evidently found the publications to be libelous, to be false in some material particular, and to have been published with actual malice. There was ample evidence from which the jury could have made these findings, and it is presumed that the jury was clearly convinced that actual malice existed. There was evidence capable of being clear and convincing to the jury on this point.

The argument that Justice Sprouse's damages must have been inconsequential because "look where he is now" has the same degree of persuasion as the case pointed out by counsel for the defendant involving Senator Barry Goldwater who was once nominated by his party as a presidential nominee.

I have worried considerably about the size of this verdict but I am unable to come to the conclusion that the size of the verdict could be taken to indicate that the jury was influenced by passion, partiality, prejudice, or corruption, or that the jury entertained a mistaken view of the case.

Believing as I do that the parties to this case had a fair trial, and that no prejudicial error was committed during the trial of the case I will leave the amount of the verdict in this case for the collective judgment of our Supreme Court Judges. This case has been headed in that direction from the beginning.

This case was finally submitted to me about the 10th of November, when I received Mr. Chambers' letter to the effect that he did not desire to make any further briefing in opposition to the plaintiff's brief which was filed here October 30.

I have put in every available moment that I had on this case since it was submitted, realizing that if the verdict should stand, any delay whatever on my part would cost the defendant approximately $125.00 a day in interest.

I have appreciated what I consider to be the high professional treatment of this case by all of counsel for both parties. I trust that each one will realize that I took seriously each matter properly brought to my attention from the time this case was filed in the Clerk's Office. The fact that I did not comment upon every point does not mean that I regarded the point as not being important.

For example I did not comment upon the assigned point of error no. 27. I simply conclude, after studying the briefs and the cases cited that there is no infringement of the defendant's rights under the United States Constitution; there having been evidence, and where needed clear evidence from which the jury could make its findings.

In going over this record I notice that the Special Court Reporter who was here during Mrs. Batton's illness and hospitalization set out the instructions which the Court gave to the jury in one continuous form as though all of the plaintiff's and all of the defendant's instructions given to the jury were read as one single charge to the jury or one course of instructions to the jury.

This, of course, is actually the way it is read to the jury but it may be confusing. It may be that you will want these instructions set out in the usual way, and I call this to your attention in order that this case will not be sent back here for retrial because of some mistake in form made by a very fine Court Reporter who had been working in Washington for several years, and was unfamiliar with the ordinary method used in transcribing the record.

Most sincerely yours,

CHARLES L. GARVIN, JR.

CLG : msd

APPENDIX D

Order of the Circuit Court of Fayette County, West Virginia Filed December 9, 1970, Together with a letter Opinion of Said Court Dated November 10, 1970

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

JAMES M. SPROUSE, Plaintiff,

v.

THE CHARLESTON MAIL ASSOCIATION,
a corporation, Defendant.

Civil Action No. C-4885

Order

This day came the parties by counsel upon the motion of the defendant for summary judgment, and the Court having duly considered the same, is of the opinion to and does hereby overrule said motion in accordance with the Court's Letter Memorandum of Opinion dated November 10, 1970, a copy of which is attached hereto and made a part of the record herein; to which action of the Court, the defendant does object and except.

DATED DEC. 9, 1970.

ENTER: CHARLES L. GARVIN JR.
JUDGE

INSPECTED BY: ROBERT K. KELLY

PRESENTED BY: R. L. DITRAPANO

TWELFTH JUDICIAL CIRCUIT OF WEST VIRGINIA
FAYETTE COUNTY

CHARLES L. GARVIN, JR., JUDGE

FAYETTEVILLE, WEST VIRGINIA

NOVEMBER 10, 1970

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T. E. Myles, Esquire
Attorney at Law
Fayetteville, West Virginia

Robert K. Kelly, Esquire
Attorney at Law
P. O. Box 553
Charleston, West Virginia

Gentlemen:

Re: Sprouse v. C-4885 Daily Mail

This case on the matter now before me has been well argued and well briefed, and the problem is completely understood by all of counsel.

I received the last brief, August 28th. I've studied briefs and the cases and rules cited.

It is my opinion and I hold the following:

Judge Taylor's opinion by letter dated March 11, 1969, required a dismissal of the action pending in the Thirteenth Judicial Circuit under RCP 12 (b) (6). A reading of Judge Taylor's letter opinion does not indicate that he was passing upon the merits of the case, nor that the dismissal was with prejudice.

Such is apparently what our Supreme Court would hold, if I correctly interpret the case of U. S. Fidelity & Guar. Co. vs: Eades, et al, 150 W. Va., 238. The final words of syllabus No. 4 are as follows:

"- - - - a judgment sustaining a motion to dismiss under Rule 12 (b) R. C. P. is not a dismissal with prejudice."

The same is also more fully reflected on Page 247 of the opinion.

The case in Kanawha Circuit not having been adjudged upon the merits, having been dismissed without prejudice, the doctrine of res judicata does not here apply.

The motion for summary judgment is overruled.

Most sincerely yours,

(s) CHARLES L. GARVIN JR.

CLG/usa

APPENDIX E

Order of the Circuit Court of Fayette County, West Virginia Filed May 26, 1970, Together with a Letter Opinion of Said Court Dated March 24, 1970

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

Civil Action No. C-4885

JAMES M. SPROUSE, Plaintiff,

v.

THE CHARLESTON MAIL ASSOCIATION,
a West Virginia Corporation, (Inadvertently named
the Charleston Daily Mail Association in the Complaint),
Defendant.

Order

This day came the parties by counsel on the motion to quash and to dismiss the above styled action for reasons stated in said motion that said Court lacked venue.

Upon consideration of written briefs filed by the parties hereto, the Court is of the opinion and accordingly does hereby overrule said motion.

The defendant hereby objects and excepts to the Court's ruling.

Enter: CHARLES L. GARVIN, JR.
Judge

DATED: 1970

Submitted By:

/s/ R. L. DITRAPANO

Approved By:

/s/ F. PAUL CHAMBERS

Entered: 5/21/70.
Civil O. BX. 10, Pgs. 287

TWELFTH JUDICIAL CIRCUIT OF WEST VIRGINIA
FAYETTE COUNTY
CHARLES L. GARVIN, JR., JUDGE
FAYETTEVILLE, WEST VIRGINIA

March 24, 1970

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T. B. Myles, Esquire
Attorney at Law
Fayetteville, West Virginia 25840

Gentlemen:

Re: Sprouse Vs: Civil Action No. C-4885

The Charleston Daily Mail Association

The Court is of the opinion to overrule the defendant's motion to quash this action; the Court holding that under the Code of West Virginia relating to venue, and under the case decided by the West Virginia Supreme Court of Ap-

peals styled C. Harold Hanks vs Beckley Newspaper Corporation, a corporation, et al, 149 W. Va., 552, venue is not lacking in the Circuit Court of Fayette County.

The Court has received excellent briefs from the lawyers on both sides of this case. I have studied these briefs and have read the cases and citations and in view of the fact that all of these points have been thoroughly discussed in the briefs I can see no useful purpose to be served by my discussing them again. The West Virginia case cited above covers many of the points raised by counsel for the defendant, and this Court does not find that the other points raised in support of the motion are well taken. The point raised by defendant's counsel which seems to me to bear the most weight is the argument against trying a case such as this in a court which is approximately 52 to 55 miles distant from where the parties reside or have their domicile. But, of course, this very matter was passed upon by our Supreme Court in the Hanks vs Beckley Newspaper case. When Mr. Chambers originally telephoned me to ask to have this motion set for argument, it is my present recollection, he told me that this case had originally been brought in Kanawha County. I am not advised as to what happened there, but no one has advised me of any reason as to why this case could not be tried in Kanawha County. Nevertheless, I feel compelled to overrule the motion based upon the Hanks case, and after giving full consideration to the other arguments and points of law raised by counsel.

Most sincerely yours,

CHARLES L. GARVIN, JR.

CLG/usa

APPENDIX F

PLAINTIFF'S INSTRUCTION No. 2a

[Given, over objection, by the trial court]

The Court instructs the jury that libel in a case brought by a nominee for public office may be defined as a false writing published by the publisher with knowledge of its falsity, or false publication published with a reckless disregard of its falsity, and which tends to injure the reputation of the nominee, to throw contumely or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule, or contempt.

PLAINTIFF'S INSTRUCTION No. 5

[Given, over objection, by the trial court]

The Court instructs the jury that a libel is no more justifiable when published against a candidate for public office than if published of him on any other occasion. The publication of a falsehood with actual malice, as defined in these instructions, finds no justification whatever under the law. The law does not permit the character of those seeking public office or those holding public office to be destroyed under any guise of privileged publication, where falsehoods are published with actual malice.

PLAINTIFF'S INSTRUCTION No. 7

[Given, over objection, by the trial court]

The Court instructs the jury that even though failure to investigate, on the one hand, and mere ill will, bias, spite or prejudice on the other, standing alone, are insufficient to establish either a knowledge of the falsity of, or a reckless disregard of the truth or falsity of the materials used; however, such evidence, if any, of motive, intent, may be considered for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity.

PLAINTIFF'S INSTRUCTION No. 10

[Given, over objection, by the trial court]

The Court instructs the jury that if you find for the plaintiff, James M. Sprouse, in estimating the damages, you may take into consideration the extent of the circulation given to the articles published in the defendant's newspaper, the rank, standing, and position of the plaintiff, James M. Sprouse, at the time of the publication, any injury to his fame and reputation, the grief, anguish, mental suffering, mortification, and humiliation which the plaintiff has undergone and suffered by reason of the articles; if you believe from the evidence that his fame and reputation were injured and that he did suffer grief, anguish, mental suffering, mortification, or humiliation, then you may award to the plaintiff such compensatory or actual damages as you find from the evidence the plaintiff has suffered or that it is reasonably certain he will suffer in the future by reason of said publications, not exceeding the amount of compensatory damages demanded in the complaint.

DEFENDANT'S INSTRUCTION No. 3

[The first and last paragraphs on this instruction were refused and not read to the jury.]

The Court instructs the jury that the First Amendment to the Constitution of the United States prohibits any action by the United States or by any State abridging freedom of speech or freedom of the press; that one purpose of the First Amendment was and is to insure that debate on public issues and on candidates for public office should be uninhibited, robust and wide open; that the First Amendment protection of free speech and a free press does not recognize any exception for any test of truth alone because erroneous statement is inevitable in free debate and must be protected if freedoms of expression are to have the breathing space that they need to survive.

The Court further instructs the jury that all of the news stories and editorials published by the defendant, and complained of by the plaintiff, were constitutionally protected and require a verdict for defendant, unless:

First, one or more of the publications complained of constituted "libel" as that term is defined for you in these instructions;

Second, the libelous publication or publications were false in some material particular; and

Third, the libelous and false statements were published with "actual malice" as defined in these instructions;

The burden is upon the plaintiff to prove the first two of these essential elements by a "preponderance of the evidence" as that phrase is defined in these instructions;

The burden of proof to be borne by plaintiff with respect to the third essential element—actual malice—is more strict. The plaintiff has the burden of proving actual malice by "clear and convincing evidence".

The Court instructs the jury that by clear and convincing evidence is meant more than a mere preponderance of evidence. Clear and convincing evidence is that evidence which is so clear, explicit, and unequivocal as to leave no substantial doubt and which is sufficiently strong to command the unhesitating assent of every reasonable mind.

If you find that plaintiff has failed to establish any of these three essential elements by the standard explained, it is your duty to return a verdict for defendant.

As has been said the burden of proof of each element necessary to a verdict for plaintiff is upon the plaintiff. The defendant is not obliged to call any witness or to introduce any evidence.

DEFENDANT'S INSTRUCTION No. 6

[Refused by the trial court]

The Court instructs the jury that the word "malice," in this case, does not refer to political opposition, illwill or even hatred. Political opposition, illwill or hatred alone is not the malice to which these instructions refer. Thus, even if you believe that the defendant newspaper was politically opposed to the plaintiff, harbored ill feelings toward the plaintiff or even hated the plaintiff, you should return a verdict for the defendant unless the plaintiff proves by clear and convincing evidence that defendant published the news stories knowing the material misstatements of fact, if any, were false or acted with a reckless disregard of whether they were true or false.

DEFENDANT'S INSTRUCTION No. 7

[Refused by the trial court]

The Court instructs the jury that in considering the news stories complained of which quote or attribute statements to Arch A. Moore, Jr., the Republican nominee for Governor, there was no legal duty on the part of defendant to subject Moore's statements to any test of truth; and that accordingly, since plaintiff has presented no evidence from which you could find that Moore's statements were not accurately and fairly reported, you may not return a verdict for plaintiff against defendant based on statements of Moore published by defendant, even though you may believe from the evidence that Moore's statements were libelous and false and that he was aware of the falsity or acted with a reckless disregard of whether they were true or false.

DEFENDANT'S INSTRUCTION No. 14

[Refused by the trial court]

The Court instructs the jury that the publications complained of by plaintiff were published on October 24 and 25 of 1968 and that the question of libel, falsity and actual

malice must be determined as of the time the various publications were published.

DEFENDANT'S INSTRUCTION No. 16

[Refused by the trial court]

The Court instructs the jury that the plaintiff cannot recover damages in this action for any pecuniary loss to plaintiff because no pecuniary loss is alleged in plaintiff's Complaint and there is no evidence that the plaintiff has sustained such damages.

DEFENDANT'S INSTRUCTION No. 18

[Refused by the trial court]

The Court instructs the jury that plaintiff, in addition to his burden to establish the three essential elements necessary for a verdict in his favor, has the burden of alleging and proving his actual, measurable damages, if any, by a preponderance of the evidence. No actual damages can be presumed or inferred.